(5) (4)

Nos. 94-7448, 94-7492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROLAND J. BAILEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

CANDISHA S. ROBINSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

No. 94-7448; *Bailey* v. *United States*

September 7, 1989	Indictment in United States District Court for the District of Columbia filed
October 24, 1989	Superseding Indictment filed
March 1, 1990	Jury Verdict entered following two-day trial
June 8, 1990	Sentencing
June 18, 1990	Notice of Appeal filed
June 18, 1993	Opinion of the United States Court of Appeals for the District of Columbia Circuit filed
October 18, 1993	Order granting Suggestion for Rehearing In Banc filed
October 4, 1994	Opinion of the In Banc United States Court of Appeals for the District of Columbia Circuit filed

No. 94-7492; *Robinson* v. *United States*

August 8, 1991	Indictment in United States District Court for the District of Columbia filed
October 30, 1991	Retyped Indictment filed
October 31, 1991	Jury Verdict entered following two-day trial
December 18, 1991	Opinion of the United States District Court for the District of Columbia filed
February 11, 1992	Resentencing
February 11, 1992	Notice of Appeal filed
June 18, 1993	Opinion of the United States Court of Appeals for the District of Columbia Circuit filed

July 2, 1993	Resentencing
October 18, 1993	Order granting Suggestion for Rehearing In Banc filed
October 4, 1994	Opinion of the In Banc United States Court of Appeals for the District of Columbia Circuit filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 89-0310

UNITED STATES OF AMERICA

v.

ROLAND J. BAILEY

TRIAL TESTIMONY (EXCERPTS)

February 27, 1990

WASHINGTON—DIRECT

* * * *

[64] Q. And if you would, just demonstrate the motion you saw the defendant making as he was getting out of the car.

A. As I asked him to get out, he grabbed the open door at the same time (demonstrating). There's a console here, bucket seats; he was stuffing something like between the seat and the console as he was getting out of the car.

Q. Thank you.

Would you resume the stand, please.

[The witness resumes the stand.]

BY MS. VINCENT:

Q. What, if anything, did you do next after you saw him making this motion?

A. I asked my partner to hold on to the defendant while I seen what he was trying to conceal between the console in the car.

Q. Now, how did you go about locating whatever it was?

A. Well, the door was open, and I squatted down to the driver' side of the car and just pushed the seat back. And as I did, that's—that's when I saw the pouch. And from the pouch dropped a white pack, a pack of white powder.

Q. Did you recover the pouch and the pack of white powder?

A. I did.

[65] Q. What, if anything, did you do with them after you recovered them?

A. I handed them over to my partner, Officer Rice.

Q. Did you observe anything else in the car other than the leather pouch and the packets of white powder?

A. Yes, I did.

Q. And what was that, sir?

A. A round of ammunition.

Q. And where was that located?

A. On the console of the car.

* * * *

WASHINGTON—CROSS

* * * *

[76] Q. But you weren't on your scooter at the time you saw Mr. Bailey. Isn't that correct?

A. That includes parking violations.

Q. So you were just standing there?

A. Yes, sir.

Q. And what kind of—what were you doing that was causing you to stand there?

A. Looking for traffic violations.

Q. To observe traffic violations.

A. Uh-huh.

Q. In fact, you had never received any indication that Mr.—you had no idea that Mr. Bailey was headed toward that area, did you?

A. No, I didn't.

Q. And you had no indication—you had received no information about him, isn't that correct?

A. No, I didn't.

Q. And during the time you observed him, you didn't observe him do anything other than drive that car. Correct?

A. That's right.

* * * *

[82] WASHINGTON—RECROSS

* * * *

BY MR. ELLENBOGEN:

* * * *

Q. Now, let me draw your attention to Government's Exhibit Number 4.

[The exhibit is handed to the witness to view]

BY MR. ELLENBOGEN:

Q. Did you take that photograph?

A. No, I didn't.

Q. Were you present when that photograph was taken?

A. Yes, I was.

Q. Okay.

Now, you testified a few minutes ago when I was asking you questions—remember? And I asked you if you were able to see the gun in plain view and you said you couldn't remember?

A. Right.

Q. Now, does this refresh your recollection?

A. No, it doesn't.

* * * *

[93] RICE—DIRECT

* * * *

BY MS. VINCENT:

* * * *

Q. Now, let's back up a little bit.

Now, you had mentioned that there was a gun recovered from the car?

A. Yes, there was.

Q. Where was the gun found?

A. In the trunk of the vehicle.

Q. And could you describe for the ladies and gentlemen of the jury exactly how you went about searching the trunk and coming upon the weapon.

A. Once the vehicle was stopped and it was determined Mr. Bailey was under arrest, a search was conducted of the trunk—[94] well, we opened the trunk. Inside, there was a whole lot of items. In the trunk were items of clothing and bags and other things, and the gun was there.

Q. I am showing you what has been marked and admitted into evidence as Government's Exhibit Number 4.

[The exhibit is handed to the witness to view.]

BY MS. VINCENT:

Q. I'd ask you to take a look at Government's Exhibit 4 and tell me if you recognize what it is.

A. It's a green plastic bag with clothes inside of what appears to be a trunk and an automatic weapon.

Q. And do you recognize what that picture depicts?

A. It depicts the trunk of the vehicle that we stopped on that particular day.

Q. And is that the location where you found the gun?

A. That is.

* * * *

[95] Q. Officer, was the gun that you recovered from the trunk of the car loaded or unloaded?

[96] A. It was loaded with one clip.

Q. Let me show you what has been marked as Government's Exhibit Number 12 for identification.

[The exhibit is placed in front of the witness.]

BY MS. VINCENT:

Q. I would ask you to take a look at what was contained inside of Government's Exhibit Number 12 for identification and tell me, please, if you recognize what it is.

A. This is the weapon that was recovered from the trunk of the vehicle.

Q. Now, I also want to show you what has been marked Government's Exhibit Number 13 for identification.

[The exhibit is first shown to Mr. Ellenbogen and then handed to the witness to view.]

BY MS. VINCENT:

Q. And I would ask you, please, to take a look at Government's Exhibit Number 13 and tell me if you recognize what was inside of the envelope.

A. One automatic clip with seven rounds of ammo.

Q. Is that the clip that was in that weapon?

A. Yes.

* * * *

[97] Q. Now, you mentioned something else was found in the car?

A. Large sum of money.

Q. Where was the money recovered?

A. Some money was recovered from Mr. Bailey and over $2500 recovered from the trunk of the vehicle.

Q. Where in the trunk of the vehicle was the money recovered?

A. Inside a white waist vest jacket.

Q. In total, do you know how much money was recovered from Mr. Bailey and from that vehicle?

A. It was $3,216.

Q. And do you recall the denominations of that sum of money?

A. I believe it was eight $100 bills, $446 in one-dollar bills; around ten $50 bills; fifteen $20 bills—all of it was initialed with my initials on it.

* * * *

* * * *

Q. Okay.

Officer Rice, you testified that you were on motorcycle patrol that day. Correct?

A. That's correct.

Q. And your duty assignment was to monitor traffic and to engage in traffic stops. Correct?

A. That's what we were doing that day. It was not a specific assignment. We were just doing traffic stops.

Q. Okay.

Now, you received—did you receive instructions that morning before you went on duty as to what your assignment would be?

A. Other than assigned to motor scooter patrol, motorcycle patrol, no.

Q. Okay.

So you were never told that Roland Bailey was out in the community selling drugs, were you?

MS. VINCENT: Objection, Your Honor.

THE COURT: He may answer.

THE WITNESS: I never knew of Roland Bailey.

BY MR. ELLENBOGEN:

Q. In fact, the first time you had ever seen, heard, or knew of him was when you participated in his arrest. Correct?

[108] A. That's correct.

Q. And you never saw—you never saw Mr. Bailey do anything other than drive that car. Correct?

A. That day, that's all I saw until the arrest, yes.

Q. Now, I direct your attention to Government's Exhibit Number 14. That's the vest where you found the money?

A. That's correct.

Q. Did you have an opportunity to examine that vest?

A. Briefly looked at it earlier.

Q. Is Mr. Bailey's name written on that vest anywhere?

A. No, it isn't.

Q. Was he wearing it when he was arrested?

A. No, he wasn't.

Q. That was in a bag of clothing in a trunk. Correct?

A. It was in the trunk; but specifically in a bag, I don't recall. There was a couple of bags there; I can't recall if it was inside a bag.

Q. But there was a lot of stuff in that trunk. Wouldn't that be fair to say?

A. That would be fair to say.

Q. Okay.

Now, let me direct your attention to Government Exhibit Number 4.

[The exhibit is handed to the witness to view.]

BY MR. ELLENBOGEN:

[109] Q. Was that the way the bag appeared when you first observed it?

A. Yes, we moved the bag to open the bag, yes.

Q. So you couldn't see the gun in the trunk when you opened the trunk, could you?

A. No, I couldn't.

Q. How long had you been searching before you discovered the gun?

A. Once we opened the trunk, maybe a minute. It wasn't long.

Q. You started opening the bags in the trunk, too. Correct?

A. That's correct.

Q. And you opened one bag—was that the first bag you looked in?

A. I couldn't say what was the first thing I looked in. I don't know.

Q. Okay.

Now, did you have to—when you opened the bag, was that the very first thing you saw? Or did you have to pull things out before you came across it?

A. No, the gun was visible when the bag was opened.

Q. Okay.

Now, do you recall whether or not the safety to the gun was on when you found it?

A. I don't know. I'm not familiar with automatic weapons.

* * * *

[159] DiDOMENICO—DIRECT

* * * *

Q. I had asked you what is the prevalence of persons involved in drug trafficking possessing and using weapons, firearms.

[160] A. It has become very prevalent on the street now, particularly in the last two or three years.

They use the weapons for several reasons: first of all, self-protection. Drug dealers do get robbed. The stickup men know they have two things—drugs and money.

So they use the weapons not only to protect themselves, but they use them to protect their assets, drugs and money.

Also weapons are used for enforcement purposes. They are also used to protect their turf. Drug dealers get very territorial. They like to protect the areas they deal from. They will use the weapons to protect their areas.

So currently there are a lot of weapons seized out there from drug dealers, particularly in the last two or three years.

Q. Let me ask you, detective—well, let's go back to drugs for a minute.

Are the drugs that persons who are involved in drug trafficking use always on their person?

A. No, like drug dealers commonly employ what's called a stash. That's simply a place of concealment. They hide the drugs. They do that for a number of reasons.

First of all, should they be arrested, they don't want to be caught with drugs on their person. They also don't

want police seizing their drugs; they don't want the stickup people to get their drugs; so they will hide them.

[161] Q. What about the—in that same vein, what about the weapons? Are the weapons always on the person?

A. If someone is on the street, generally they may be on their person or within reach.

Depending on the type of situation, if it's a stash house where they store their drugs and cash, there would be weapons within the premises within reach.

They hide them in vehicles, trucks, and even people use airplanes to conceal them. But they are made so that they are accessible in case they need to use them to protect drugs or cash or their person.

* * * *

[164] DiDOMENICO—CROSS

* * * *

Q. Now, detective, let's talk about guns for a little bit.

You kept saying that the purpose for having guns is to protect yourself. Right?

A. Well, when used with drugs, yes.

Q. That's one purpose. One purpose is to protect you.

[165] Correct?

A. Protect the individual, yes.

Q. One purpose is to protect your drugs. Correct?

A. The drugs, the money.

Q. Another purpose is to enforce so that people may know you. Correct?

A. Enforcement for either people who owe or people who have dealt for you and messed up, yes, they are used.

Q. Okay.

Now, we talked about the protection. You've used the phrase that the guns have got to be accessible. Right?

A. I simply stated it would be accessible, yes, to protect self, stash, . . .

Q. That's right.

A. That would do with drugs and money.

Q. In fact, if somebody were on the street with drugs, they would want to be able to get to their guns—well, you don't—when the stickup boys come, they don't give you any advance warning, do they?

A. No, neither do the cops.

Q. It happens like that (snapping fingers), doesn't it?

A. Yes.

Q. So you need to be able to get your gun like that (snapping fingers), don't you?

A. Well, it should be accessible to them if they're going [166] to use a weapon, yes.

Q. If people are—

A. To protect their turf.

A. That's right.

Generally, it's sort of understood on the street that you really don't carry your weapon unless you intend on using it. Isn't that right?

A. But anyone who carries one would intend to use it.

A. That's right.

And you need to be able to use it very quickly right?

A. If indeed that's what they're for.

Q. Now, let's talk about the actual use of the gun. Are you familiar with semiautomatic guns?

A. Vaguely. I carry one myself.

Q. And the idea behind the semiautomatic gun is all you've got to do is just pull the trigger once you get the slide going. Right?

A. Firepower, yes.

Q. That's right.

And that's because you get more firepower when you can fire eight shots—bang, bang, bang, bang, bang—then you can having to put a bullet in a gun one at a time. Right?

A. Surely. I used to carry a six-shot. Now I carry 16. It's a lot better and a lot faster.

[167] Q. Because power and speed are what's most important. Isn't that right?

A. If you are trying to protect yourself, yes.

Q. Detective, in all your experience, you've talked to a lot of drug dealers. Right?

A. Yes.

Q. You've talked to a lot of drug users?

A. Drug dealers, traffickers,—

Q. Stickup boys? Have you ever talked to any stickup boys?

A. Oh, yes.

Q. In all your experience talking with the stickup boys, did any of them ever tell you that they ever gave the person they were sticking up an opportunity to go get their gun first?

A. That's ridiculous, no.

Q. Thank you.

A. They don't give you much chance to get your weapon, but neither would I as a cop.

Q. Thank you.

MR. ELLENBOGEN: I have no further questions.

THE COURT: Thank you, Mr. Ellenbogen.

Anything else, Ms. Vincent?

MS. VINCENT: I just have a couple.

REDIRECT EXAMINATION

BY MS. VINCENT:

Q. Detective, in your experience, you had mentioned to us [168] that guns are secreted in different places?

A. Sure.

Q. And with reference to cars, where would guns be secreted?

A. Common spots are glove boxes, underneath the seat, or the trunk.

Q. Well, detective, if the gun is in the trunk, is it, in your opinion, accessible to the person who possesses it?

A. They can get to it. A lot of weapons are stored with the stash; so in case they are forced to get in the

trunk, a weapon is there. The stash, the drugs, the cash—the weapon is readily available.

Q. Thank you.

MS. VINCENT: I have nothing further.

THE COURT: Thank you.

Anything else, Mr. Ellenbogen?

MR. ELLENBOGEN: One further question.

RECROSS-EXAMINATION

BY MR. ELLENBOGEN:

Q. You don't know anything about this case, do you?

A. That is correct.

Q. Thank you.

THE COURT: Anything else?

MS. VINCENT: No, Your Honor.

THE COURT: Thank you, Detective DiDomenico. You're excused, sir.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Title Omitted in Printing)

BAILEY JURY INSTRUCTIONS (EXCERPTS)

February 28, 1990

* * * *

[89] The defendant has been charged in count two with using or carrying a firearm during and in relation to a drug-trafficking crime as charged in count one of the indictment.

In order to find the defendant guilty of using or carrying a firearm during and in relation to a drug-trafficking crime, you must find that the government has proven beyond a reasonable doubt each of the following: one, that the defendand committed a drug-trafficking crime for which he may be prosecuted in a United States court, that is, the charge in count one; and, two, that during and in relation to the commission of that drug-trafficking crime, the defendant knowingly carried or used a firearm.

You may find that the defendant knowingly and intentionally carried or used a firearm if he possessed the firearm and intended that the firearm be present and available in some manner.

A person may possess an object by having it on his person or by having control over the object and access to it.

Using the firearm does not necessarily mean discharging it or otherwise firing or displaying the firearm. The word "use" can mean any use, such as display of the firearm or use of the firearm for security or for protection purposes.

However, the defendant must have known that the gun was present and intended that the gun was to be used in some way to further the drug-trafficking crime charged in [90] count one.

The mere presence of the firearm at or during a crime is not enough to find that the firearm was used.

The term "during" means at some point in the course of a drug-trafficking crime, regardless of how short a period of time.

"In relation to" means that there must be a relationship between the firearm and the underlying narcotics offense.

You may infer that the possession of a firearm is intended to further the underlying narcotic offense, but you are not required to do so.

I instruct you that possession with the intent to distribute cocaine, which is the offense set forth in count one of the indictment, is a drug-trafficking crime.

You must be satisfied that the defendant is guilty of the underlying narcotic offense before you may convict him of using or carrying a firearm in relation to a drug-trafficking crime.

* * * *

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 90-3119

UNITED STATES OF AMERICA

v.

ROLAND J. BAILEY,
Appellant.

Appeal from the United States District Court
for the District of Columbia (CR 89-00310-01)

Argued April 5, 1993

Decided June 18, 1993

Before D.H. GINSBURG, SENTELLE, and RANDOLPH, Circuit Judges.

D.H. GINSBURG,* Circuit Judge:

Roland J. Bailey appeals his conviction for (1) possession with intent to distribute five grams or more of cocaine in violation of 21 U.S.C. § 841(a); (2) using or carrying a firearm in connection with that drug trafficking offense in violation of 18 U.S.C. § 924(c); and (3) possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). He alleges that the district court com-

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* Except Part II.B., which is filed *per curiam*.

mitted reversible error by refusing to instruct the jury on simple possession as a lesser included offense of possession with intent to distribute cocaine; that there was insufficient evidence of his having "used" a gun to convict him under 18 U.S.C. § 924(c); and that the 16-month delay between his arrest and indictment violated his right to a speedy trial pursuant to 18 U.S.C. § 3161 (b). We affirm the convictions on all counts.

I. BACKGROUND

In May 1988 Officers Ronald T. Washington and Kevin Rice of the Metropolitan Police Department stopped Bailey's car after noticing that it had no front license plate and no inspection sticker. Officer Washington asked Bailey for his driver's license but Bailey instead handed him a District of Columbia identification card. Officer Washington then ordered Bailey to get out of his car. As Bailey exited the car, Officer Washington saw him push something between the seat and the front console. Upon searching the passenger compartment, Officer Washington found one round of ammunition and 27 plastic bags containing a total of 30 grams of cocaine. After placing Bailey under arrest, Officer Rice searched the trunk and found there a loaded 9-mm. pistol and $3,216 in cash, mostly small bills.

Later that month Bailey was indicted in the Superior Court of the District of Columbia on D.C. drug and weapons charges. In September 1989 a superseding indictment was handed down in federal district court, charging Bailey with the federal drug and weapon charges enumerated above.

At Bailey's trial Detective Charles DiDomenico, a narcotics expert, testified that the drugs found in the appellant's car were packaged for sale in $50 bags and that the quantity and packaging were "not consistent with personal use." He also stated that drug dealers frequently carry weapons "not only to protect themselves, but [also]

to protect their assets, drugs and money." The jury found the appellant guilty as charged, and the district court sentenced him to concurrent prison terms of 51 months each on the first and third charges and sixty months on the second charge.

II. ANALYSIS

As indicated above, the appellant offers three grounds for appeal.

A. Instruction on Lesser Included Offense

First, the appellant argues that the district court erred in refusing to instruct the jury on simple possession of cocaine as a lesser-included offense of possession with intent to distribute cocaine. Not so.

The district judge is required to give a lesser-included offense instruction only when "a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck v. United States,* 489 U.S. 705, 716 n. 8, 109 S.Ct. 1443, 1451 n. 8, 103 L.Ed.2d 734 (1989); *see also United States v. Thornton,* 746 F.2d 39, 47 (D.C.Cir.1984) (lesser-included offense instruction is required "if there is any evidence fairly tending to bear upon the lesser included offense, 'however weak' that evidence may be") (quoting *Belton v. United States,* 382 F.2d 150, 155 (D.C.Cir.1967)). There must "be some rational basis for the lesser charge; otherwise it is merely a device for [a] defendant to invoke the mercy-dispensing prerogative of the jury." *United States v. Sinclair,* 444 F.2d 888, 890 (D.C.Cir.1971); *see also Kelly v. United States,* 370 F.2d 227, 229 (D.C.Cir.1966) ("An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction").

In this case there was no evidence from which a jury could rationally have concluded that Bailey possessed the

cocaine without intending to distribute it. He was nabbed with the 30 grams of cocaine appropriately packaged for street distribution and with more than $3000 in small bills. According to the uncontradicted testimony of the Government's narcotics expert, possession of 27 packages each containing $50 worth of cocaine is inconsistent with merely personal use. *See United States v. Beckham*, 968 F.2d 47, 53 (D.C.Cir.1992) (upholding denial of instruction on lesser-included offense of simple possession where Government drug expert testified without rebuttal that stash was incompatible with personal use); *accord United States v. Payne*, 805 F.2d 1062, 1067 (D.C.Cir.1986) ("If the jury believed the Government's [expert testimony], the jury would have had no rational basis for returning a guilty verdict of simple possession").

As in *Beckham*, therefore, "No aspect of the government or defense cases—not even a combination of aspects of each—supports a simple possession theory." 968 F.2d at 52. Accordingly, we affirm Bailey's conviction for possession with intent to distribute.

B. Use of the Firearm

Section 924(c)(1) provides, in pertinent part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

Bailey claims that there was insufficient evidence for the jury to find that he "use[d]" the 9-mm. gun found in his trunk "during and in relation to" a drug trafficking crime.

"As a jury has found [the appellant] guilty, we must consider the evidence in the light most favorable to the Government," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), and allow the Government "the benefit of all reasonable inferences that may be drawn from the evidence." *United States v. Sutton*, 801 F.2d

1346, 1358 (D.C.Cir.1986). In determining the sufficiency of the evidence, we must affirm the appellant's conviction if "*any* rational trier or fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *United States v. Derr*, 990 F.2d 1330, 1336 (D.C.Cir.1993); *United States v. Morris*, 977 F.2d 617, 619 (D.C.Cir.1992); *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990); *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990).

This court has fashioned a two-part test to determine whether a defendant "used" a firearm "during and in relation to" the drug trafficking crime he committed. *See Derr*, 990 F.2d at 1337; *Jefferson*, 974 F.2d at 225. First, there must be evidence of a "nexus . . . between [the] particular drug *offender* and the firearm." *Long*, 905 F.2d at 1577 (emphasis added). This element can be, and usually is, satisfied by proof that the defendant actually or constructively possessed the gun. *See Derr*, 990 F.2d at 1337. Second, there must be evidence "that the guns facilitate[d] the predicate *offense* in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir. 1992) (emphasis added); *accord Derr*, 990 F.2d at 1337. "Both elements must be proven to establish criminal liability under § 924(c)." *Jefferson*, 974 F.2d at 205.

Because the appellant concedes that he possessed the firearm, we need address only the question whether the Government has shown that the gun facilitated the appellant's commission of a drug trafficking offense. It is well-settled that "mere possession of a gun at the time that the crime is committed is not enough to establish use." *United States v. Bruce*, 939 F.2d 1053, 1054 (D.C.Cir. 1991). On the other hand, the Government need not establish that the defendant brandished or discharged the weapon, *see Morris*, 977 F.2d at 621; *Long*, 905 F.2d at 1576; *United States v. Evans*, 838 F.2d 891, 896 (D.C.Cir.1989); *United States v. Castro-Lara*, 970 F.2d

976, 983 (1st Cir.1992); *United States v. Plummer*, 964 F.2d 1251, 1255 (1st Cir.1992); *United States v. Alvarado*, 882 F.2d 645, 653 (2d Cir.1989); *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir.1989); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir.1989); *United States v. Tolliver*, 937 F.2d 1183, 1190 (7th Cir.1991); *United States v. Lyman*, 892 F.2d 751, 753 (8th Cir.1989); *United States v. Matra*, 841 F.2d 837, 841-43 (9th Cir.1988); *United States v. Mason*, 658 F.2d 1263, 1270-71 (9th Cir.1981); *United States v. Moore*, 580 F.2d 360, 362 (9th Cir.1978), or even "that he was carrying the gun at the time of a specific transaction." *United States v. Knox*, 950 F.2d 516, 518 (8th Cir.1991).

Rather, in addition to showing possession (*i.e.* a nexus between the firearm and the offender), the Government need only "prove a connection between the firearm and an underlying drug offense," here possession with intent to distribute cocaine, *Jefferson*, 974 F.2d at 206; *accord Castro-Lara*, 970 F.2d at 983; *United States v. Robertson*, 706 F.2d 253, 256 (8th Cir.1983); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985). More precisely, "the Government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking." *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1424 (5th Cir.1989); *accord United States v. munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.1990) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that presence of the weapon was in some way connected with drug trafficking"); *Stewart*, 779 F.2d at 540 (Government must show that defendant possessed firearm and "that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others").

The Supreme Court has recently endorsed an "expansive" understanding of what constitutes use "in relation to" a drug trafficking offense. *Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2058, 124 L.Ed. 2d 138 (1993). In *Smith* the Supreme Court cites the Webster Dictionary definition of "in relation to" as meaning "with reference to" or "as regards." *Id.* (*quoting* Webster's New International Dictionary of the English Language, at 2102). The Court then states that "[t]he phrase 'in relation to' thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith, supra* at ——, 113 S.Ct. at 2059. Modifying the verb "use" with "in relation to" serves the purpose of " 'allay[ing] explicitly the concern that a person could be' punished under § 924(c)(1) for committing a drug trafficking offense 'while in possession of a firearm' even though the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at ——, 113 S.Ct. at 2058 (*quoting Stewart*, 779 F.2d at 539 (Kennedy, J.)).

Here the defendant was carrying in the front seat of his car crack cocaine neatly packaged for sale in $50 bags, and in the trunk $3,216 in small bills. The trier of fact could reasonably infer that the money was the proceeds of several already-completed drug transactions. *Cf. United States v. Curry*, 911 F.2d 72, 80 (8th Cir. 1990) ("we believe it was permissible to infer that the large sums of unexplained cash found in the same bedroom as the guns came, at least in part, from drug sales" given the large quantities of high purity cocaine found elsewhere in the house); *United States v. Beverly*, 921 F.2d 559, 563 (5th Cir.1991) ("A jury . . . could reasonably connect the [$2,200 in] cash to the drug trafficking"); *compare Bruce*, 939 F.2d at 1055-56 (showing that gun was available only to protect future intended distribution of drugs insufficient for § 924(c) conviction).

As the Government's expert witness testified, a drug dealer often carries a gun in order to protect himself, his contraband, and his money. *See United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir.1985) (recognizing "the utility of firearms in advancing criminal adventures in narcotics" and observing that "[w]eapons can be used for protection or intimidation and therefore facilitation of illegal transactions"); *accord United States v. Grant*, 545 F.2d 1309, 1313 (2d Cir.1976); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir.1976); *United States v. Rosado*, 866 F.2d 967, 970 (7th Cir.1989); *Curry*, 911 F.2d at 80; *United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990); *United States v. Milham*, 590 F.2d 717, 721 (8th Cir.1979); *Stewart*, 779 F.2d at 540; *Mason*, 658 F.2d at 1271.

To be sure, the gun here was not within Bailey's reach while he was driving. In that circumstance, "the court's critical concern is not whether the gun was instantly available or exclusively dedicated to the narcotics trade, but whether it was available for use in connection with the narcotics trade." *Castro-Lara*, 970 F.2d at 983 (quotation marks and citation omitted); *accord United States v. Boyd*, 885 F.2d 246, 250 (5th Cir.1989) ("It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that the presence of the weapon was in some way connected with the drug trafficking"); *Young-Bey*, 893 F.2d at 181 (jury may "infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)"); *cf. United States v. Acosta-Cazares*, 878 F.2d 945, 952 (6th Cir.1989) (" 'uses' and 'carries' [in § 924(c)(1)] should be construed broadly to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions").

Indeed, if Bailey sold drugs from anywhere outside the passenger compartment of his car, *e.g.*, in a building or

on a street corner—a rather likely scenario, to say the least—then he could remove the gun from the trunk and carry it with him as he conducted this risky business. *Cf. Jefferson*, 974 F.2d at 207 (gun stored in backyard next to contraband "was sufficiently accessible"); *Castro-Lara*, 970 F.2d at 983-84 (unloaded gun in locked automobile trunk was available for use during and in relation to drug trafficking crime); *Beverly*, 921 F.2d at 561-63 (unloaded guns and ammunition in safety deposit box underneath mattress in room where drugs were found sufficient to convict under § 924(c)); *Molinar-Apodaca*, 889 F.2d at 1419-1424 (upholding conviction where gun and cash were in locked safe in house and drugs were stashed in shed outside); *Rosado*, 866 F.2d at 968-69 (evidence sufficient for § 924(c)(1) conviction where defendant left gun in own car and conducted drug transaction in nearby car); *United States v. Knox*, 950 F.2d 516, 519 (8th Cir.1991) (gun in passenger compartment of car sufficiently available to defendant carrying drugs and loaded ammunition clip as he exited nearby building); *Curry*, 911 F.2d at 80 (although "found in a different room than the cocaine" gun was "readily available to secure the possession of [appellant's] cocaine and cash"); *Stewart*, 779 F.2d at 539 (defendant in car in front of his residence had "rifle under his control in the trunk of his car"). Moreover, it was unlikely that in conducting a sale—the moment of maximum exposure to depredation—the defendant would fail to protect his inventory, including the 27 bags of cocaine that later formed the basis of the indicted charge. The jury could reasonably infer therefore that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions. *See United States v. Hadfield*, 918 F.2d 987, 998 (1st Cir.1990) ("so long as one purpose in situating the weapon nearby was to protect the narcotics enterprise, that need not have been defendant's sole purpose"); *Stewart*, 779 F.2d at 539

("Given the use of firearms in some drug transactions . . . and the known risks of conducting an illegal drug business, the jury could infer from all of the evidence that [defendant]'s possession of the [firearm] outside his residence was intended to facilitate the drug operations or secure the premises where contraband and other evidence were located"); *see generally United States v. Ingraham*, 832 F.2d 229, 240 (1st Cir.1987) ("The law is not so [ostrich-like] as to compel a criminal jury to ignore that which is perfectly obvious").

The appellant argues that because the gun was in the trunk, under our holdings in *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991) and *United States v. Derr*, 990 F.2d 1330, 1339 (D.C.Cir.1993), it can not be deemed to have protected or facilitated his past possession of the cocaine. In *Bruce* the court found that the small derringer in the defendant's raincoat could not have been used to protect his possession of drugs because the small gun was "hardly the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Bruce*, 939 F.2d at 1055. Instead, the gun was clearly intended "to be used for defendant's protection at the time and place of subsequent distribution." *Bruce*, 939 F.2d at 1056. Similarly, in *Derr* we found that the placement of an unloaded gun behind a padlocked door in a house "suggested that it was far more likely [to] . . . be used to protect the [future] distribution, rather than the possession, of the drugs." *Derr*, 990 F.2d at 1339. Indeed, in getting his gun from the closet the defendant in *Derr* risked "expos[ing] the drugs to capture," so that "the gun seems to have been put where it was least likely to protect possession of the drugs." *Id.* (footnote omitted).

Here, in contrast, the cocaine packaged for sale and the $3,216 in small bills in the trunk logically support the inference that Bailey had already been dealing drugs from his car. And the loaded gun in the trunk was sufficiently accessible to have been used to protect a prior distribution effected outside the confines of the passenger compartment of the car.

In protecting such an earlier distribution of drugs, the gun was necessarily used also to protect Bailey's earlier possession of cocaine. As he walked from his car to the point of sale, like any drug dealer he was constantly in danger of being attacked by bandits or by a potential customer. Until the actual sale, of course, he possessed the narcotics. In effect, for a drug dealer on the streets, possession and distribution are inextricably linked, *cf. Bruce*, 939 F.2d at 1055 ("in the typical crack house possession and distribution are intertwined"), and the jury could reasonably conclude that during the tense moments leading up to the exchange of drugs and money, Bailey used the gun in the trunk to protect his inventory of drugs (including the 27 bags recovered by the police). *Accord Derr*, 990 F.2d at 1337 ("there must be evidence showing that the firearm actually facilitated the *possession* of the drugs") (emphasis in original).

For the foregoing reasons, we believe that *Derr* and *Bruce* can be distinguished from the situation here. In any event, the precedential value of *Derr* and *Bruce* has been called into question by the Supreme Court's recent decision in *Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2058, 124 L.Ed.2d 138 (1993), which adopts a much less restrictive interpretation of what constitutes "use" of a firearm "in relation to" a drug trafficking offense. *Smith* states that a gun is used in relation to a drug trafficking offense if "the firearm [has] some purpose or effect with respect to the drug trafficking crime." *Id.* at ——, 113 S.Ct. at 2059. Clearly, the gun had the purpose of protecting the cash in the trunk, and only slightly less obviously, had the purpose of protecting the drugs and money on Bailey's person. This is not a case where "the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Id.* at ——, 113 S.Ct. at 2059

(internal citation omitted). When § 924(c) is construed "in accord with its ordinary or natural meaning," as we are reminded to do in *Smith*, *id.* at ——, 113 S.Ct. at 2054, we think a rational jury could easily have concluded that Bailey "used" the loaded high-caliber gun in the trunk of the car he was driving "during and in relation to" a drug trafficking crime.

C. Speedy Trial Act Challenge

Bailey argues that the 16-month delay between his arrest and his indictment in federal court violates his right to a speedy trial pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(b). In his brief the appellant concedes that *United States v. Mills*, 964 F.2d 1186, 1189 (D.C. Cir.1992) (en banc), forecloses his appeal on this issue, but states that he wishes to preserve his point in case the Supreme Court grants certiorari in *Mills*. Since the filing of Bailey's brief, however, the Court has denied certiorari in *Mills*, —— U.S. ——, 113 S.Ct. 471, 121 L.Ed.2d 378 (1992), and we therefore affirm the district court on this issue.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is in all respects

Affirmed.

D.H. GINSBURG, Circuit Judge, dissenting as to Part II.B.:

Sometimes the law *is* "a ass, a idiot," Mr. Bumble. Our recent holdings in *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), and *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), are cases in point. But until the Supreme Court or this court sitting *en banc* changes the law, those decisions are the law and we must apply them faithfully. Because I do not believe that our disposition of the § 924(c) issue can honestly be reconciled with *Derr* and *Bruce*, I respectfully dissent.

In *Derr* an unloaded .357 magnum and nine rounds of ammunition were found alongside cash, drugs packaged for sale, and a scale, all in a locked closet in an apartment. There was incontestable evidence of drug trafficking from the apartment. *See* 990 F.2d at 1332, 1338. Nonetheless, this court held that the gun could not have been " 'used' to facilitate the predicate offense" of possession with intent to distribute drugs because the unloaded firearm was too inaccessible to protect the possession of the drugs in the apartment. *Id.*, at 1337. Similarly, in *Bruce* a loaded gun was found stored with drugs, cash, and ziplock bags in a raincoat handing in a closet. Again the court held that the gun's location was too remote from the defendant for him to use it to protect his possession of the drugs and thus to facilitate the predicate offense of possession with intent to distribute the drugs. *See* 939 F.2d at 1056.

The present case presents a similar fact pattern: a loaded 9-mm. pistol was found alongside cash in the locked trunk of a car, while the drugs were located next to the defendant in the front seat of the car. The court distinguishes *Derr* and *Bruce*, however, on the ground that a jury could reasonably infer that Bailey had used the gun here to protect himself and his goods during drugs sales made before his arrest, as well as the cash proceeds thereof. The problem is that the exact same

inference could easily have been drawn in *Derr* and *Bruce*, but the court in those cases found the evidence insufficient as a matter of law to support a conviction for using a firearm to facilitate a drug trafficking offense.

I do not see any principled basis for distinguishing *Derr* or *Bruce* from the present case. That the gun in *Derr* was unloaded is certainly not dispositive. An unloaded gun can facilitate a drug trafficking crime almost as well as a loaded gun, by emboldening its owner and intimidating others. *See United States v. Gutierrez-Silva*, 983 F.2d 123, 124-25 (8th Cir.1993) (upholding § 924(c) conviction involving unloaded gun in closet of apartment containing no ammunition; crediting expert's testimony that "it is very difficult for a person to determine whether a gun was loaded or not when the gun is pointed at that person"); *cf. McLaughlin v. United States*, 476 U.S. 16, 17, 106 S.Ct. 1677, 1678, 90 L.Ed.2d 15 (1986) (holding that unloaded handgun is "dangerous weapon" under federal bank robbery statute on the grounds that a gun "is always dangerous even though it may not be armed").* Nor can *Bruce* be distinguished on the ground that the defendant there possessed a smaller firearm, a Derringer. The court can not substitute its judgment for the jury's by inferring that an otherwise accessible gun is too small to be useful.

Such particularistic distinctions are all beside the point anyway under the highly formalistic analysis that this circuit has apparently adopted. In order to uphold a conviction under § 924(c) there must be evidence that the

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* *See also* DIRTY HARRY (Warner Bros. 1971) (bank robber decides not to reach for pistol when inspector points gun at him and says, "I know what you're thinking: 'Did he fire six shots, or only five?' Well, to tell you the truth, in all this excitement I've kinda lost track myself. But being this is a .44 magnum, the most powerful handgun in the world, and would blow your head clean off, you've got to ask yourself one question: 'Do I feel lucky?, . . . Well, do ya, punk?") (*quoted in* Eric Bailey, *How to Get Your Own Back*, DAILY TELEGRAPH, Feb. 5, 1993, at 17).

gun "facilitate[d] the predicate offense in some way." *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir. 1992). Although the issue of what constitutes a "predicate offense" in this context appears not to have been contested in prior cases, our caselaw requires that a § 924(c) conviction be predicated upon a drug offense charged in the indictment and proved at trial—which in this case could only be possession with intent to distribute. *See, e.g., Derr*, 990 F.2d at 1337 (gun must have provided protection during "the time of the possession which is the basis of the charge"); *cf. United States v. Laing*, 889 F.2d 281, 288 (D.C.Cir.1989) (upholding § 924(c) conviction despite acquittal for predicate offense because jury may have still been "convinced of the defendant's guilt").

Thus when the defendant is charged only with possession, "there must be evidence showing that the firearm actually facilitated the *possession* of the drugs." *See Derr*, 990 F.2d at 1337 (emphasis in original). I for one cannot imagine how a gun in a locked car trunk could have been used to protect the possession of the 27 bags in the front seat—if one accepts the premise that the guns in *Derr* and *Bruce* could not protect the drugs with which they were closeted. *See Derr*, 990 F.2d at 1337-1339 (unloaded gun stowed together with ammunition, drugs, and cash in locked closet in apartment insufficiently accessible to protect drugs in same closet); *Bruce*, 939 F.2d at 1056 (gun in raincoat hanging in closet not sufficiently available to protect drugs in pocket of same raincoat).

It is irrelevant that the jury here might reasonably have inferred that the gun was used to protect the possession of drugs Bailey had sold earlier or the cash proceeds of those sales, because neither the cash nor the already-sold drugs formed "the basis of the indicted charge" against him. *Compare Bruce*, 939 F.2d at 1055 (rejecting Government's argument "that since possession of drugs with intent to distribute is a 'continuing crime,' " proximity

is sufficient to establish "use") *with* Op. at 1118 ("The jury could reasonably infer . . . that the weapon located in the trunk was used to facilitate the defendant's sales of narcotics and the possession of all of the drugs that necessarily preceded those transactions").

All that said, it seems to me that the "predicate offense" analysis of our circuit defies both apparent congressional intent and common sense. Congress clearly enacted § 924(c) in order to deter drug dealers from arming themselves, which vastly enhances the threat they pose to the community. *See Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2059, 124 L.Ed.2d 138 (1993), ("introduction [of guns] into the scene of drug transactions dramatically heightens the danger to society") (*quoting United States v. Harris*, 959 F.2d 246, 262 (D.C.Cir.1992)). Common sense indicates that although he was not charged with distribution, Bailey had in fact been dealing drugs; he was not carrying more than $3000 in small bills for nothing and he was not planning to give the last of his drugs away free or to raffle them off for charity. Common sense also suggests that Bailey had taken the gun along to facilitate his drug transactions; he was not just delivering the gun to his fearful grandmother for use as domestic protection.

On its face § 924(c) reaches the use of a firearm "in relation to *any* . . . drug trafficking crime," not only to a "predicate [drug] offense" charged against the defendant. Presumably, therefore, if we were writing on a clean slate, we might hold that the "related" drug trafficking crime need not have been charged so long as all of its elements are proved beyond a reasonable doubt. *Cf.* Op. at 1116-17 (stating that jury could reasonably infer that money was proceeds of prior drug distributions). Our circuit, however, in *Bruce* and *Derr* ignored ordinary rules of construction and adopted a cramped interpretation of § 924(c). Were it not for those cases I would gladly join the majority in upholding the § 924(c) conviction.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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(Title Omitted in Printing)

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Oct. 8, 1993

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Before: MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBERG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

PER CURIAM.

Appellant's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is granted and this case will be reheard by the Court sitting *en banc*.

It is FURTHER ORDERED, by the Court *en banc*, that the judgment of the court filed herein on June 18, 1993, 995 F.2d 1113, is hereby vacated.

SUPREME COURT OF THE UNITED STATES

No. 94-7448

ROLAND J. BAILEY,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 94-7492, *Candisha Summerita Robinson, aka Candysha Robinson v. United States,* and a total of one hour is allotted for oral argument.

April 17, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 91-453-01(CRR)

UNITED STATES

v.

CANDYSHA SUMMERITA ROBINSON

ROBINSON JURY INSTRUCTIONS (EXCERPTS)

October 31, 1991

* * * *

COUNT FIVE—USING OR CARRYING A FIREARM DURING AND IN RELATION TO A DRUG TRAFFICKING OFFENSE

Count Five charges the defendant with using or carrying a firearm, specifically a High Standard, .22 caliber Derringer, during and in relation to the offenses charged in Counts Three and Four of this Indictment, in violation of Title 18, U.S. Code, §§ 924(c)(1) and Title 18, U.S. Code § 2.

The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt are:

First, that the defendant committed the offenses charged in Counts Three and Four of this Indictment, that is, she possessed with the intent to distribute 5 or more grams of a controlled substance, namely a mixture or substance containing a detectable amount of cocaine base on July 16, 1991, and that she did so within 1,000 of Gallaudet University; and

Second, that the defendant knowingly and intentionally used or carried a firearm, specifically, a High Standard, .22 caliber Derringer, while committing the offenses charged in Counts Three and Four.

To establish the first element of this offense, the Government must prove beyond a reasonable doubt that the defendant committed the offenses charged in Counts Three and Four. If you answered "No" on your Verdict Form as to Count Three or Count Four, then you must also answer "No" on your Verdict Form with regard to this offense. You are reminded to pay careful attention to the instructions on your Verdict Form in this regard.

To establish the second element of the offense charged in Count Five, the Government must prove beyond a reasonable doubt that the defendant knowingly and intentionally used or carried the firearm during and in relation to the offenses charged in Counts Three and Four.

The Indictment alleges the firearm in question was one High Standard, .22 caliber Derringer. The term "firearm" means any weapon which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive of the frame or receiver of such a weapon.

I have previously explained to you the difference between actual and constructive possession and sole and joint possession in Count Three. These propositions of law also apply here to the issue of whether a defendant possessed the firearm as charged in Count Five.

The term "during and in relation to" means at some point in the course of the offense on July 16, 1991, regardless of how short a period of time. To prove that a defendant used or carried a firearm during and in relation to the offenses charged in Counts Three and Four, the Government is not required to prove that a defendant had actual possession of the firearm or that he used

it in an affirmative manner, for example by brandishing or firing it. Instead, the Government must prove beyond a reasonable doubt only that the firearm was in such a location that it would have been available to a defendant to provide protection or assistance during the commission of the offense of possession with intent to distribute 5 or more grams of cocaine base within 1,000 feet of Gallaudet University as charged in Counts Three and Four.

You may find that the defendant knowingly and intentionally used or carried a firearm if she did so consciously, voluntarily and purposely, and not because of mistake, inadvertence or accident.

The government has also charged the defendant with aiding and abetting the commission of the offense charged in Count Five. As an alternative theory, the Government charges that the defendant aided and abetted another person or persons in carrying or using a firearm during and in relation to the offenses charged in Counts Three and Four of this Indictment. I have previously described the principles of aiding and abetting, and will not define it again here. In considering whether this defendant aided and abetted the commission of the offense charged in Count Five, you are specifically instructed to consider the explanation of aiding and abetting liability which the court has given you in Count One.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

(Title Omitted in Printing)

Dec. 18, 1991

MEMORANDUM OPINION AND ORDER

CHARLES R. RICHEY, District Judge.

Pursuant to Fed.R.Crim.P. 29, Defendant Candysha Robinson renews her Motion for a Judgment of Acquittal with respect to her conviction for using or carrying a firearm in relation to the offense of unlawful possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 18 U.S.C. § 924(c).[1] Upon

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[1] Candysha Robinson was convicted of: Count I-distributing crack cocaine on July 15, 1991 in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2; Count II-distributing crack within 1,000 feet of a public school on July 15, 1991 in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; Count III-possession with intent to distribute 5 or more grams of cocaine base on July 16, 1991 in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B)(iii), and 18 U.S.C. § 2; Count IV-possession with intent to distribute 5 or more grams of cocaine base within 1,000 feet of a school on July 16, 1991 in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; Count V-using or carrying a firearm in the course of the offenses charged in Counts III and IV in violation of 18 U.S.C. § 924(c) and 21 U.S.C. § 841(a)(1), 841(b)(1)(C), and 860(a), and 18 U.S.C. § 2; Count VI-knowingly making available for use a building, room or enclosure for the purpose of using, storing, manufacturing or distributing cocaine base on or about July 16, 1991 in violation of 21 U.S.C. § 856(a) and 18 U.S.C. § 2. The Government provided a reformed Indictment at trial, and the Court refers to the numerical ordering of the charges as set forth therein.

consideration of the Defendant's Motion, the record herein, and the applicable law, the Court denies the Motion.

The Court must deny a motion for judgment of acquittal when, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990) (emphasis in original) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). "When a reasonable mind might fairly have a reasonable doubt of guilt or might fairly have none, the decision is for the jury to make." *United States v. Herron*, 567 F.2d 510, 514 (D.C.Cir.1977); *see also United States v. Harrison*, 931 F.2d 65, 71 (D.C.Cir.1991) ("We do not determine whether we would find guilt beyond a reasonable doubt, but only whether a reasonable jury could find guilt beyond a reasonable doubt"). This standard recognizes that courts give "full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact." *United States v. Reese*, 561 F.2d 894, 898 (D.C.Cir.1977); *see also United States v. Sutton*, 801 F.2d 1346, 1358 (D.C.Cir. 1986). Because the jury is entitled to draw reasonable inferences from the evidence presented, "there is no requirement of direct evidence against the defendant; the evidence may be entirely circumstantial." *Poston, supra*, 902 F.2d at 94, n. 4; *see also United States v. Simmons*, 663 F.2d 107, 108 (D.C.Cir.1979). In short, courts review a jury's determination "very deferentially." *Harrison, supra*, 931 F.2d at 71.

The Defendant makes two basic contentions in support of her Motion. First, the Defendant claims that the evi-

dence was insufficient to sustain a finding that she possessed the firearm, and therefore, she could not have used or carried the gun in relation to the offense. *See United States v. Long*, 905 F.2d 1572, 1576 (D.C.Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 365, 112 L.Ed. 2d 328 (1990). Second, relying upon *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), the Defendant contends that, even if she did possess the firearm, the Government did not adduce sufficient evidence to prove beyond a reasonable doubt that she, or anyone else, used or carried the gun in relation to the drug trafficking crime. A closer review of the evidence presented at trial demonstrates the weakness in both of these arguments, and convinces the Court that there was sufficient evidence upon which a rational juror could convict.

Even under the case precedent relied upon by the Defendant, the evidence amply supports the jury's finding that Candysha Robinson possessed the gun. In *United States v. Long*, 905 F.2d at 1577, the Court reversed a conviction for using or carrying a firearm in relation to a drug offense because the record was "devoid of *any* evidence linking Long to the revolver in the sofa, other than his presence in the apartment and involvement with narcotics." (emphasis in original). In *Long*, the Court found it especially significant that there was no evidence that Long knew of the gun's existence, and no evidence that Long owned, leased or lived at the premises. *Id.* at 1576. In order to demonstrate how the Government could make a case of constructive possession, the *Long* Court pointed to *United States v. Anderson*, 881 F.2d 1128 (D.C.Cir.1989). In *Anderson*, there was "substantial evidence" linking the Defendant to the gun. *Long*, 905 F.2d at 1578. This "substantial evidence" consisted of evidence that the Defendant lived in the apartment, testimony that the Defendant had keys to the bedroom in which the gun was located, and the fact that the Defendant's wallet and photographs were found in the bedroom. *Id.* The fact that the Defendant in *Anderson*

lived at the premises was "[o]f paramount importance" and "justified an inference that [the Defendant] constructively possessed the apartment's contents." *Id.*

The evidence supporting the jury's inference that Candysha Robinson possessed the drugs and the gun in the locker is almost as strong as the evidence in *Anderson, supra*, and certainly more convincing than the case against the Defendant in *Long, supra*. Here, it is undisputed that Candysha Robinson lived at the premises and was the lessee. *See* Gov't Exhibit 15 (rent receipts in name of Candysha Robinson). Furthermore, the Defendant admits that she owned the locker and used it to store her personal items, including her tax returns. *See* Transcript, Vol. I. at 133.[2] (hereinafter, "Tr.") On the basis of this evidence, a reasonable jury could conclude that the Defendant knew of, and had at least constructive possession of, the items in the trunk. *See Anderson, supra.*

Defendant seeks to avoid this conclusion by arguing that a codefendant, Kwarme Parker,[3] allegedly possessed the key to the locker and also "owned" the drugs and gun found therein. This argument fails. First, the Government introduced evidence at the trial which showed that, in a prior drug transaction at the premises, Candysha Robinson and her sister entered the bedroom when a buyer (who turned out to be an undercover officer) inquired about the availability of drugs. Peering inside the bedroom, the officer saw Candysha Robinson hand a

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[2] This portion of the transcript reads:

Q: Was there a trunk that was in your room?
A: Yes, that was my trunk, where I kept all of my important papers and grade papers, and I store my junk in that chest.
Q: Did you have your tax returns in that trunk?
A: Everything.

[3] Mr. Parker pled guilty to certain charges in the Indictment prior to Ms. Robinson's trial.

rock of cocaine to her sister. After the Defendant's sister emerged from the bedroom, she sold the rock of crack cocaine to the undercover officer. *See* Tr. Vol. I. at 7 (testimony of Officer Hale). This testimony could indicate to a reasonable juror that Candysha Robinson had knowledge of the drugs being sold in her house and also presents circumstantial evidence that the Defendant was keeping drugs in her bedroom.

In a second sale, another lodger in the Defendant's apartment, Kwarme Parker, sold crack cocaine to an undercover officer. According to Officer Hale's testimony, Parker went to the Defendant's apartment in order to retrieve the drugs. Tr.Vol. I. at 8-9. The police recovered from the trunk in the Defendant's bedroom the marked money used to buy the drugs in this second transaction. *Id.* at 9-11. From this second transaction, the jury could infer that the drugs which Candysha Robinson transferred to her sister in the first transaction were stored in the same place—the locker—as were the drugs, cash and gun later confiscated by the police upon execution of a search warrant.

Finally, based on her ownership of the locker, her decision to allow Parker to have keys to the locker, and her own admitted suspicions about Parker's drug use, *see* Tr.Vol.I. at 131-133, the jury could reasonably infer that Ms. Robinson knew that Mr. Parker was storing the drugs and gun in the locker. Even though Defendant gave a key to Mr. Parker, she had access to the locker as well. In fact, the Defendant admitted that she last used the locker on the Sunday night prior to the execution of the search warrant. Tr.Vol. I. at 136. These facts, in addition to evidence indicating the Defendant's role in a prior drug sale at the house, are sufficient to establish constructive possession of the drugs and the gun by Ms. Robinson. *See Anderson, supra; United States v. Jenkins,* 928 F.2d 1175, 1179 (D.C.Cir.1991) (jury entitled to find that, although drugs were hidden from view, the

Defendant who owned the house was on constructive notice of them).[4]

The case precedent in *United States v. Bruce,* 939 F.2d 1053 (D.C.Cir.1991) does not undermine the verdict rendered by the jury in this case. In *Bruce,* the Court of Appeals held that mere possession of drugs and a gun in close proximity does not necessarily establish that the gun was "used in relation to" the drug offense. *See Bruce,* 939 F.2d at 1054 ("mere possession of a gun at the time the crime is committed is not enough to establish use"). Rather, when the defendant is charged with possession with intent to distribute drugs, the Government must prove that the defendant actually used the gun to assist in that act of *possession.* Evidence which suggests that the defendant would use the gun at some unknown point in the future when distributing the drugs is insufficient to sustain a conviction under 18 U.S.C. § 924(c). *Id.* at 1055. According to the Court of Appeals, this standard is the only way to fairly apply the term "use * * * in relation to" the drug offense when the predicate offense is as elastic as possession with intent to distribute. *Id.* ("Since possession with intent to distribute is in a sense a passive crime, it becomes somewhat difficult analytically to determine how one goes about using a gun in relation to that crime.")

However, the Court of Appeals acknowledged that, in crack houses, drug dealers use guns to protect the ongoing possession of the drugs being sold there. The Court explained the uniqueness of the crack house scenario for purposes of § 924(c):

> If guns are strewn around a "crack house" in which drugs are stored, it might be inferred that the guns

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[4] At the very least, this evidence is sufficient to establish that Ms. Robinson aided and abetted Mr. Parker's possession of the drugs and the gun by allowing him to store these materials in her home. *See United States v. Jenkins, supra; United States v. Raper,* 676 F.2d 841, 849 (D.C.Cir.1982). *Cf. United States v. Poston,* 902 F.2d 90 (D.C.Cir.1990) (Thomas, J.).

> are there to protect the occupant's "possession." In such a case, the guns are "used" in relation to the drug trafficking crime of possession with intent to distribute because they are intended to protect the stash of drugs that will subsequently be distributed. And although actual distribution is a separate crime, courts have treated evidence of the use of guns in such a house for protection of the distribution function as equivalent to protection of possession. Since in the typical crack house possession and distribution are intertwined, that seems to us to be a logical interpretation of the statute.

Id. (citations omitted).

Given this standard, it is easy to understand why the Court of Appeals vacated Bruce's conviction for using a gun in relation to the possession with intent to distribute offense. In *Bruce*, upon execution of a search warrant, the police found numerous ziplock bags and a fully-loaded .22 caliber Derringer revolver in the pockets of Bruce's trench coat, located inside the closet door next to the front door of the house. The gun was enclosed in a belt buckle found inside of a brown paper bag. Bruce lived in the house with his mother and other family members. The residence was not a "crack house", as there was no evidence that drug sales occurred there. The Court invalidated the conviction under § 924(c) because there was no evidence that Bruce would use the gun in relation to his possession of the drugs at the house. Based upon the evidence, the Court concluded that, at most, Bruce would use the gun only when distributing drugs elsewhere sometime in the future. Because "use" of the gun is required by the clear terms of the statute, an "intent to use" the gun in the future does not suffice.

Defendant Robinson's gun conviction survives the *Bruce* precedent because she was also convicted of maintaining a "crack house" in violation of 21 U.S.C. §856

(a) and 18 U.S.C. § 2.[6] As explained in *Bruce*, the fact that the premises was a base for the distribution of crack cocaine permits the inference that the gun was used to facilitate the possession with intent to distribute. Based upon the evidence describe above, the evidence was sufficient for the jury to convict the Defendant of using or carrying the firearm in the course of the offense of unlawful possession with intent to distribute cocaine base within 1,000 feet of a school.

Defendant claims that this case cannot fit within the contours of *Bruce* and *Anderson* because the weapon was in a locked trunk and was not readily available for use. This fact is not as critical as the Defendant implies. In *Anderson, supra*, the shotgun was inside of a bag on the floor in a bedroom which was apparently kept locked, as evidenced by the presence of a key inside the bedroom door at the time of the arrest. *See* 881 F.2d at 1141. Moreover, the Defendant in *Anderson* was not in the bedroom in which the police confiscated the shotgun. *Id.* at 1140. Thus, the fact that someone had to undertake special steps to obtain the weapon—entering the bedroom, possibly unlocking the door, and opening the bag—did not preclude the *Anderson* court from finding that the gun was used in relation of the drug trafficking offense. Likewise, in this case, there is evidence upon which the jury could legitimately infer that the Defendant had access to the gun in the trunk, and could use the gun to protect the stash of drugs and the proceeds of drug sales

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[6] Although Defendant does not directly challenge the "crack house" conviction, the instant Motion implicitly levels such an attack. Defendant claims that the amount of drugs and money does not comport with the typical drug house. This argument fails; it ignores the fact that two prior isolated transactions occurred at the premises, a fact which expressly distinguishes this case from *Bruce*. Defendant also ignores Detective Stroud's testimony that crack houses come in many varieties. *See* Tr.Vol. I. at 75-77.

should the need arise. This is all that *Bruce* requires.[6] *See also United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989) ("when guns are present in order to protect contraband they may be deemed to be used in relation to the underlying felony.")

Accordingly, for all of these reasons, the Defendant's Motion for Judgment of Acquittal shall be, and hereby is, DENIED.

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[6] Although the gun in this case was a Derringer, the Government's evidence does not suffer from the same infirmity as did the Government's case in *Bruce, supra*. *See* 989 F.2d at 1055. Unlike *Bruce*, the Government here has presented testimony as to the usefulness of the Derringer as a "second gun" in protecting the stash. *See* Tr.Vol. I. at 77-79 (testimony of Detective Stroud).

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-3062

UNITED STATES OF AMERICA,
Appellee,

v.

CANDISHA S. ROBINSON,
Appellant.

Appeal from the United States District Court
for the District of Columbia, Crim. No. 91-0453

Argued Dec. 7, 1992

Decided June 18, 1993

Order Granting Rehearing En Banc and
Vacating Judgment Oct. 8, 1993

Before: MIKVA, Chief Judge, SILBERMAN and HENDERSON, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

Dissenting opinion filed by Circuit Judge HENDERSON.

MIKVA, Chief Judge:

Candisha Robinson was convicted after a jury trial of numerous drug-related offenses including "us[ing] or

carry[ing] a firearm" during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1). Ms. Robinson concedes that the evidence was sufficient to support a finding that she constructively possessed the unloaded derringer found in the locked trunk in her apartment, but argues that her conviction under section 924(c)(1) should be reversed because the evidence failed to establish that the gun was actually used during and in relation to the drug trafficking offenses for which she was convicted. Ms. Robinson also contends that the district court erroneously increased her sentence by two points on the grounds that she was a "supervisor" to a drug trafficking scheme, and erroneously imposed a $300 rather than a $200 special assessment fee. We agree with appellant, with respect to all three arguments, and therefore reverse her conviction under section 924(c) and remand to the district court for resentencing.

I.

According to the government's evidence, on July 15, 1991, Officer Larry Hale approached appellant's sister, Veloria Robinson, and told her that he wished to buy some crack cocaine. Veloria took Officer Hale to Apartment 3, 1722 West Virginia Avenue, N.E. and knocked on the door. When appellant Candisha Robinson opened the door, Veloria explained that Officer Hale was trying to get something. Candisha asked him what he wanted. Officer Hale said that he wanted a "twenty" and followed Veloria into the apartment. Officer Hale saw Veloria and Candisha go into the apartment's one bedroom and observed Candisha hand Veloria a rock of crack cocaine. Veloria then gave the rock to Officer Hale in exchange for $20 in marked money.

The next evening, Officer Hale returned to the apartment. As he was walking up the steps, he was approached by a man named Kwarme Parker. Parker stated that Veloria was inside the apartment, but that he also lived in the apartment and could serve him. Parker went into

the apartment while Officer Hale waited in the hallway outside the front door. When Parker returned to the hallway, he gave Officer Hale a small rock of crack cocaine in exchange for marked money.

About thirty minutes later, a search warrant was executed at the apartment. Inside a locked trunk in the bedroom closet, the police found a .22-caliber derringer and holster, a 1990 tax return signed by Candisha, a letter from Candisha's employer, two rocks of crack cocaine weighing a total of 10.88 grams, $20 in marked money from the sale of cocaine made by Mr. Parker, and $42.80 in other cash. Other papers bearing appellant's name were found in other parts of the bedroom, including a lease which identified appellant and another man as the principal lessees. A plastic cassette tape case was also found in the bedroom which contained a quantity of plastic ziplock bags.

At trial, the government called an expert witness, Detective David Stroud, who testified that the rock of cocaine in the locked trunk would have a $700-800 street value, as-is, but at $1400 value if it was broken down into $20 chunks. With respect to the firearm found in the apartment, Detective Stroud characterized the .22-caliber derringer as a "second gun"—the kind of gun a drug dealer might hide on his person for use until he could get to his "real gun." Mr. Stroud also testified that guns are generally used by drug dealers to protect themselves from rival drug dealers, the police, and employees within the organization.

When asked to describe a "crack house," Detective Stroud explained that there are two basic varieties. In the first type of crack house, he said, drugs are "manufactured on the premises, cut up and bagged up for street-level distribution." He added that "maybe in some cases they even sell drugs from the premises." However, Detective Stroud noted, this would be taking "a very big risk because you're inviting a raid . . . unlike selling on

the street." In the other type of crack house, people come just to smoke the drug. "There may be some limited selling of the drug going on, and they even rent the pipes to you for $2 a pipe in some of them."

Ms. Robinson took the stand in her defense. She admitted that she leased the apartment and received rent money from her sister Veloria, Kwarme Parker, and Sharine McKinney. She also acknowledged that she owned the foot-locker in which the derringer and crack were found, and that she knew that Ms. McKinney used drugs, and that Mr. Parker was selling drugs (but not out of her apartment). Ms. Robinson insisted that she had no knowledge of the drugs or the derringer found in her footlocker. She explained that she had taken Mr. Parker in temporarily because he had no place to go, but had become upset with his drug-dealing and had given him two weeks to find somewhere else to stay. She admitted allowing him to use the footlocker to safeguard his money, but claimed that she tried to prevent him from bringing drugs into her apartment by searching him and inspecting the footlocker regularly. This account was corroborated in significant respects by the testimony of Ms. Bey and Ms. McKinney. Both of them testified that appellant refused to allow Mr. Parker to sell drugs from the apartment; Ms. McKinney specifically recalled that appellant often searched Mr. Parker when he entered the apartment to ensure that he was not carrying drugs.

Ms. Robinson presented an alibi for the distribution charge. She testified that she was not in the apartment on the evening of July 15 because she was spending the night with her boyfriend in a motel. Her boyfriend, Mr. Founteroy, corroborated this story by testifying that they spent the day together going fishing and then spent the night together at a hotel. This alibi was partially contradicted by Ms. McKinney, who testified that she thought appellant was home for part of the evening, until about 10 P.M., which was almost an hour after Officer Hale said he saw appellant recover drugs from the bedroom.

Lastly, appellant read to the jury a portion of the transcript from Veloria Robinson's plea hearing. At the plea hearing, Veloria Robinson stated that it was her girlfriend, not appellant, who retrieved the crack that she sold to Officer Hale on July 15. In rebuttal, the government introduced testimony of an officer who stated that he was unable to find an original receipt for the hotel at which appellant and her boyfriend claimed they stayed on July 15.

Appellant Candisha Robinson was found guilty on all six counts of the indictment, including distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); possession with intent to distribute a quantity of cocaine base in excess of five grams, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii); commission of the charged drug offenses within 1000 feet of a school, in violation of 21 U.S.C. § 860(a); maintenance of a building for the purpose of manufacturing, storing, distributing or using cocaine base, in violation of 21 U.S.C. § 856(a); and use or carrying of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1).

Ms. Robinson submitted a post-verdict motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) directed solely to the count charging her with violating section 924(c)(1). Judge Richey denied the post-verdict motion in a memorandum opinion and order filed on December 18, 1991. 779 F.Supp. 606. At the sentencing hearing, Judge Richey adopted the Probation Officer's recommendation that Ms. Robinson's offense level be increased by two, from 28 to 30, because the evidence suggested that she was a "supervisor" of the drug trafficking scheme. Ms. Robinson was sentenced to a total of 157 months imprisonment, a four year term of supervised release and a special assessment of $300.

II.

Ms. Robinson challenges the sufficiency of the evidence to support her conviction under section 924(c). *See* 18 U.S.C. § 924(c)(1). Ms. Robinson concedes that the evidence was sufficient to support a finding that she constructively possesed the derringer found in the locked trunk in her bedroom closet, but argues that the evidence failed to establish that she actually "used" the gun "during and in relation to" the drug trafficking offenses for which she was convicted—as required by section 924(c)(1). The government, for its part, does not argue that Ms. Robinson carried, brandished or otherwise used the derringer during or in relation to the distribution of the drugs to Officer Hale. Rather, the government argues that we should affirm Ms. Robinson's conviction because Ms. Robinson's apartment was a "crack house," and in crack houses, the mere proximity of a gun to drugs is sufficient to support the inference that the defendant used the gun to protect the possession of the drugs.

When reviewing these respective claims, we are, of course, bound to view the evidence in the light most favorable to the government and respect the right of the jury to determine the credibility of witnesses, weigh evidence, and draw justifiable inferences of fact. *United States v. Williams*, 952 F.2d 418, 419 (D.C.Cir.1991). Indeed, it is well established that this Court must defer to the jury's determination and affirm if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In our effort to determine whether there was sufficient evidence to support the essential elements of section 924(c), we turn first to the language of the statute. Section 924(c) states, in pertinent part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

On its face, section 924(c) conspicuously fails to criminalize mere possession of a firearm during and in relation to a drug trafficking offense; the statute reserves punishment only for those individuals who actually carry or "use" a firearm during and in relation to an illicit drug offense. Given the way section 924(c) is drafted, even if an individual intends to use a firearm in connection with a drug trafficking offense, the conduct of that individual is not reached by the statute unless the individual actually uses the firearm for that purpose. As explained succinctly in *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C.Cir.1991), "Congress did not make it a crime to possess a gun with the *intent* to use it in relation to a drug trafficking crime. Instead, section 924(c) only makes it a crime to *use* a gun in relation to a drug trafficking crime."

Initially, the distinction between intended use and actual use may appear to put quite a hurdle in the path of a prosecutor seeking a conviction under section 924(c), particularly in cases such as this, where the primary drug offense underlying the conviction is possession with the intent to distribute. (There is absolutely no evidence that the gun played any role in the distribution of drugs to Officer Hale.) As this Court remarked in *Bruce*, it can be "somewhat difficult analytically to determine how one goes about using a gun in relation to that crime." *Id.* It is important to keep in mind, however, that even in cases where the underlying drug offense is possession with the intent to distribute, the government is not limited to evidence indicating that the defendant fired, brandished, or carried the firearm. *Cf. United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989), *cert. denied*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990). We have also identified numerous other factors which may be probative of actual use, including the accessibility

of the firearm, the type of firearm, the number of firearms, the proximity of the firearm to the drugs, and whether the firearm was loaded or previously had been used. *See United States v. Morris*, 977 F.2d 617 (D.C. Cir.1992). Although these factors are not automatically determinative of actual use, they can help the government to prove, as it must, a "nexus . . . between a particular drug offender and the firearm," *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990), *cert. denied*, 498 U.S. 948, 111 S.Ct. 365, 112 L.Ed.2d 328 (1990), and that "the guns facilitate[d] the predicate offense in some way." *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992) (quoting *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.1992)).

In this case, most of the factors we have identified in previous section 924(c) cases cut against the affirmance of appellant's conviction. First, there is absolutely no evidence that Ms. Robinson has ever brandished or previously used the firearm found in the locked trunk. *Cf. Evans*, 888 F.2d at 896 (evidence that the gun was used to threaten a subordinate suggests actual use for purposes of section 924(c)); *Jefferson*, 974 F.2d at 207. Second, although it is unclear whether Ms. Robinson had the key to the lock on the trunk, the gun certainly was not easily accessible since it was in the bedroom closet in a locked footlocker. Thus, this case stands in sharp contrast to cases like *Morris* where the firearm was within "easy reach," *see Morris*, 977 F.2d at 623, as well as *Jefferson* where the appellant placed the gun in the back yard so that people who needed the gun in relation to drug activity could have easy access. *Jefferson*, 974 F.2d at 207 (admission that the gun was previously used to protect possession of drugs supported section 924(c) conviction).

Still, the government contends that the gun was used by Ms. Robinson to protect her stash of drugs in the locked trunk. We fail to see, however, how the gun—being in a locked trunk in a bedroom closet—would be

of any help to Ms. Robinson in the event of an emergency. In order to brandish the gun, Ms. Robinson would have to run to the closet, unlock the trunk, open the trunk and grab the gun. *See United States v. Derr*, 990 F.2d 1330, 1337-38 (D.C.Cir.1993) (essential element of "use" under section 924(c) not established where the closet would have to be unlocked with keys before the gun would be accessible). Even at that point, the gun would be of virtually no use to Ms. Robinson since it was unloaded and there was no ammunition for it anywhere in the apartment. *Cf. United States v. Anderson*, 881 F.2d 1128, 1141 (D.C.Cir.1989) ("presence of loaded guns and ammunition" is pertinent evidence of actual use of firearms); *Morris*, 977 F.2d at 622 ("the fact that a gun is loaded strengthens the inference that it is actual use"). The fact that the gun was unloaded, locked away, and without ammunition anywhere on the premises, strongly suggests that Ms. Robinson had no *intention* of using the gun at that time.

Finally, we have specifically drawn distinctions between a small derringer, like the one at issue in this case, *see Bruce*, 939 F.2d at 1055, and a sawed-off shotgun, which we have recognized as a "formidable firearm" for the protection of a stash of drugs. *Jefferson*, 974 F.2d at 208. Even the government's drug expert, Officer Stroud, confessed to the jury that the derringer recovered from the locked footlocker was not the type of gun a drug dealer ordinarily would use to protect a stash of drugs. It is also worthy of note that only one gun was found on the premises. While the use of a single gun can violate the statute, *see Jefferson*, 974 F.2d at 207, when evaluating the sufficiency of the evidence under section 924(c), we have expressly distinguished the possession of a single gun from the possession of an "arsenal" of weapons. *See Anderson*, 881 F.2d at 1141; *Morris*, 977 F.2d at 622.

In short, the possession of this single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we

have held to establish actual use under the statute. In fact, we have reversed convictions under section 924(c) where there was stronger evidence against the defendant than that which is present here. In *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), for example, we carefully explored the distinction between intended use and actual use under section 924(c), and concluded that although the police found a stash of drugs next to a fully loaded .22-caliber derringer in the pocket of the appellant's trench coat, the evidence was insufficient to support the conviction under the statute. We noted that the appellant lived in the apartment with his mother and other family members, and that his gun was stored in a belt buckle found inside a brown paper bag. We held that the only reasonable view of the evidence was that the appellant would use the gun only when distributing drugs elsewhere, away from his family's apartment, sometime in the future.

We also reversed the appellant's conviction in *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), a case which is remarkably similar to this one—save the fact that a more powerful gun and ammunition were recovered by the police in that case. In *Derr*, an unloaded, holstered, .357 Magnum revolver was found by police in a locked closet in close proximity to nine rounds of .357 ammunition. The gun and ammunition were on top of a locked box containing 18.4 grams of crack cocaine and drug paraphernalia. Although the evidence in *Derr* firmly supported the conclusion that the appellant planned to use the gun in the future when distributing the drugs contained in the locked box, the inaccessibility of the gun in the locked closet, and the fact that the gun was unloaded, fatally undermined the government's theory that the defendant actually used the firearm to protect his current possession of drugs.

Despite the precedent militating in favor of reversal here, and the obvious shortcomings in the record evidence, the government argues that a rational juror still could

have inferred actual use of the firearm in this case because Ms. Robinson's apartment was a "crack house." In the government's view, this case is analogous to *United States v. Williams*, 952 F.2d 418 (D.C.Cir.1991), and *United States v. Anderson*, 881 F.2d 1128 (D.C.Cir. 1989), where convictions were upheld under section 924(c) because the proximity of the firearms to the drug paraphernalia in the "crack houses" strongly indicated that the guns were there to protect the occupants' possession of the drugs.

We do not dispute that "crack houses" present unique considerations for the purposes of section 924(c). In crack houses, unlike ordinary residences, it is reasonable to assume that readily accessible guns found on the premises are being used to protect the drugs stored there. As we noted in *Bruce*, "[i]f guns are strewn around a 'crack house' in which drugs are stored," one may infer "that the guns are there to protect the occupant's possession" of drugs. *Bruce*, 939 F.2d at 1055. *See also Jefferson*, 974 F.2d at 208 (in the context of crack houses, "protection of a drug operation may be presumed from the amount of firepower discovered on the premises").

Yet not every apartment or home that contains crack cocaine is a "crack house." As the government's expert explained, crack houses are much more than simply places where crack cocaine may be found. Crack houses are typically places where large quantities of crack cocaine are manufactured or where people come for the purpose of smoking the drug. Although the government asserts that Ms. Robinson's apartment fits within the expert's first definition of a crack house—a house maintained for the purpose of manufacturing large quantities of crack cocaine—none of the typical indicia of such a crack house was found on the premises. No scales, razor blades, equipment, or ingredients were found anywhere in the apartment. The small quantity of baggies found

in the apartment is consistent with the evidence that some persons residing in the apartment were selling small amounts of crack cocaine, not with the operation of a "crack house" of the type described by the government's expert witness. We also note that although the appellant was convicted of maintaining a building for the purpose of manufacturing, storing, distributing, or using cocaine base, in violation of 21 U.S.C. § 856(a), that statute is extremely broad and certainly not limited to "crack houses."

More importantly, even if Ms. Robinson's apartment was a "crack house," the mere presence of one or more factors generally indicative of actual use of a firearm does not automatically establish "use" under the statute. *See Bruce*, 939 F.2d at 1055 (although the defendant constructively possessed a loaded gun which was accessible and in close proximity to drugs, the conviction under section 924(c)(1) was reversed because the evidence merely suggested intended, not actual, use). The dissent mistakenly suggests that the mere proximity of a gun to drugs is sufficient to support a conviction under section 924(c) where the underlying offense is a violation of 21 U.S.C. § 856(a). *See* Dissent at 896. In fact, according to the dissent's logic, possession of any kind of gun anywhere in a crack house makes out a section 924(c) violation. That cannot be so. Where the evidence indicates that the gun recovered from a crack house was not actually used in relation to drug activity, a conviction under section 924(c) may not stand. Even in *Anderson* and *Williams* (which the dissent cites approvingly), the guns were not only in close proximity to drugs, but were also powerful, loaded and easily accessible.

Unlike *Williams*, this case does not involve a "slew of weapons [and] ammunition" in close proximity to a large quantity of drugs. *Williams*, 952 F.2d at 419. Nor does this case involve guns that are strewn around a crack house in easy reach or in plain sight, as in *Anderson*. *Anderson*, 881 F.2d at 1140. This case involves a single,

unloaded, .22-caliber derringer stored in a locked trunk with a stash of drugs. Apparently, the gun was never brandished or even removed. And while the government is free to buttress its evidence of "use" by expert testimony identifying the indicia of a drug trafficking operation, *see Morris*, 977 F.2d at 622, in this case, the government's expert witness hurt, rather than helped, the prosecutor's case. Not only did the expert's definition of a "crack house" wholly fail to describe Ms. Robinson's apartment, the expert also explicitly stated that a derringer is not the type of weapon a drug dealer would generally rely upon to protect a stash of drugs. Under these circumstances, we are compelled to conclude that this case is controlled by our decisions in *Bruce* and *Derr* rather than *Anderson* and *Williams*. The only reasonable view of the evidence in this case is that the gun was intended for use at some future date.

We note that the dissent argues that *Bruce* and *Derr* are distinguishable from this case because Ms. Robinson was convicted of a distribution offense whereas the defendants in *Bruce* and *Derr* were not. *Bruce*, 939 F.2d at 1056; *Derr*, 990 F.2d at 1333. While, in general, it may be easier to establish actual use in cases where the underlying offense is distribution (as opposed to possession with intent to distribute), in this case, there is absolutely no evidence, aside from the mere proximity of the derringer to the stash of drugs, that the gun played any role whatsoever in Ms. Robinson's distribution of drugs to Officer Hale.

If there were evidence that a loaded gun was in reach of Ms. Robinson at the time of distribution, this would be a different case. But there is no such direct evidence. The gun was unloaded and found the day after Ms. Robinson sold the crack. Plainly, the jury can not legitimately infer that even the unloaded gun was in Ms. Robinson's reach the day before. That is just speculation.

Moreover, mere proximity of a gun to drugs is not, and has never been, sufficient to support a conviction under

section 924(c) in this circuit. As we explained in *Morris*, the proximity of a gun to drugs "may cut either way, depending upon the particular facts." *Morris*, 977 F.2d at 622. Nevertheless, the dissent contends that where distribution is an underlying offense, little regard need be given to whether the gun was loaded or unloaded, locked in a safe or in plain view; nor must we consider any of the other factors this Court has identified as relevant in section 924(c) cases. *See Morris*, 977 F.2d at 621-23 (and cases cited therein). The theory, the dissent advances would require us to uphold a conviction under section 924(c) whenever the defendant is convicted of a distribution offense and the defendant's gun is found in close proximity to drugs. In the dissent's view, this practice would be justified, regardless of the surrounding circumstances, since it is possible to speculate that the defendant was "emboldened" by the possession of the gun to commit the distribution offense. *See* Dissent at 895-96 (quoting *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985)). Although this may, indeed, be the dissent's preferred result, the dissent is unable to cite a single case in this circuit which holds, or even hints, that mere proximity of a gun to drugs, and nothing more, is sufficient to support a conviction under section 924(c). The result urged by the dissent is particularly remarkable given that all the other factors identified as relevant by this Court cut the other way. Perhaps this is the reason the government never pushed this novel argument on appeal.

III.

Ms. Robinson also challenges the district court's sentencing determination. The district court explicitly adopted the Probation Officer's recommendation that Ms. Robinson's offense level should be increased by two points, from 28 to 30, because she played the role of a "supervisor" to a drug trafficking scheme. *See* U.S.S.G. § 3B1.1(b). The Probation Officer based this conclusion on two factors: 1) Ms. Robinson had "allowed her apartment to be used for storing drugs and money," and 2) Ms. Robinson had "advised her sister, Veloria Robinson, to get drugs for the undercover officer."

The government now admits that the second factor relied upon by the Probation Officer is factually inaccurate. The government's evidence clearly showed that it was Veloria Robinson who asked appellant to get the $20 rock for Officer Hale, not the other way around. Had the district court offered an additional explanation for its determination that appellant was a "supervisor," other than its explicit adoption of the Probation Officer's conclusion, reversal of the sentencing determination would not be so clear. However, the district court stated only that it adopted the Probation Officer's report "as part of the court's findings," and cryptically added that "the defendant was at least in the apartment in question before the instant offense." Since the court clearly relied on a misstatement of fact when adopting the Probation Officer's conclusions, we remand for a reconsideration of whether Ms. Robinson was, in fact, subject to an increase in her offense level for being a "supervisor."

Finally, Ms. Robinson objects to the district court's failure to reduce her special assessment from $300 to $200 after it vacated Count Three and Count Seven of the original indictment. Since the government concedes that Ms. Robinson should have been subjected to only four special assessments of $50 each, pursuant to 18 U.S.C. § 3013(a)(2)(A), we direct the district court on remand to reduce the special assessment accordingly.

Reversed and remanded.

KAREN LeCRAFT HENDERSON, Circuit Judge, concurring in part and dissenting in part:

I concur in the remand to reconsider whether Candisha Robinson (Robinson) acted as a "supervisor" within the meaning of U.S.S.G. § 3B1.1(c) and to reduce the special assessment from $300 to $200 pursuant to 18 U.S.C.

§ 3013(a)(2)(A). I dissent because in my view this case is distinguishable from *United States v. Bruce*, 939 F.2d 1053 (D.C.Cir.1991), and *United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993), the cases upon which the majority primarily relies. Moreover, in concluding that Robinson did not "use" a firearm "in relation to" a drug trafficking crime, 18 U.S.C. § 924(c)(1), the majority opinion perpetuates this court's misuse of two factors—the number and the firepower of the firearm(s) used. Neither of these factors is mentioned in the statutory language nor does either affect the "use" of a firearm.

As the majority notes, Officer Hale made two purchases from Robinson's apartment. On July 15, 1991, Veloria Robinson, Robinson's sister, took Hale to the apartment. After her sister knocked on the front door, Robinson answered and asked what Hale wanted. He asked for a "twenty" and stood in the entrance of the apartment as the two sisters went into the apartment's only bedroom. Hale observed Robinson hand her sister, Veloria, a rock of crack cocaine. Veloria Robinson came out of the bedroom and gave Hale the crack; he paid her with marked money. The next evening Hale returned to make another purchase. This time Kwarme Parker, Robinson's tenant, approached him outside the apartment. Parker indicated that Veloria Robinson was inside the apartment and that he could serve him. Parker went inside while Hale waited outside. Parker returned and exchanged a rock of crack for marked money. Hale did not see Robinson during this sale.

Thirty minutes later, the police executed a search warrant for the apartment. Robinson was then present. Inside a locked trunk in the bedroom closet, the police found 10.88 grams of crack cocaine with an estimated street value of $1,440, the marked money from the Parker drug sale, another $42.80, various personal papers containing Robinson's name and a holstered .22 caliber

derringer. In the bedroom, the police also found a plastic case for a cassette tape that contained numerous ziplock bags.

At trial, Robinson took the stand in her defense. She claimed that on July 15, she was out of town during the day and stayed overnight in a local motel. She admitted that she owned the trunk and used it to store many of her belongings. She testified that she looked inside the trunk each day [1] and that the last time she examined it before her arrest was the night of July 14. According to her testimony, she frisked Parker, who also lived in the apartment, each time he entered the apartment because she suspected that he was selling drugs. Finally, Robinson maintained that she had never seen the gun or any drugs in her apartment.

Robinson was convicted on all six counts of the indictment: one count of possession with intent to distribute more than five grams of cocaine base in violation of 18 U.S.C. §§ 841(a)(1) and (b)(1)(C), one count of possession with intent to distribute more than five grams of cocaine base within 1,000 feet of a school in violation of 18 U.S.C. § 860(a), one count of distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), one count of distribution of cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 860(a), one count of maintenance of a premises to manufacture, distribute, store or use a controlled substance in violation of 21 U.S.C. § 856(a)(1) and one count of using or carrying a firearm "during and in relation to any . . . drug trafficking crime" in violation of 18 U.S.C. § 924(c)(1). The district court denied her motion for judgment of acquittal. *United States v. Robinson*, 779 F. Supp. 606 (D.D.C.1991). She appeals only the section 924(c)(1) conviction. The majority reverses her firearm

[1] Robinson's testimony thus is at odds with the majority's assertion that "it is unclear whether Ms. Robinson had the key to the lock on the trunk." Majority Opinion at 888.

conviction because "the possession of this single, unloaded .22-caliber derringer found in a locked trunk in a bedroom closet falls significantly short of the type of evidence we have held to establish actual use under the statute." Majority Opinion at 888. The majority concludes that "[t]he only reasonable view of the evidence in this case is that the gun was intended for use at some future date." *Id.* at 890.

To reach its conclusion, the majority relies on *Bruce* and *Derr*. In *Bruce*, the police seized a trench coat in the front closet of the apartment where the defendant lived. In the pockets of the coat, the police found ziplock bags of crack cocaine, cocaine powder and marijuana; a brown bag containing empty ziplock bags; and "a brown bag containing a belt buckle which held a fully loaded .22 caliber four-shot derringer, as well as eight rounds of .22 ammunition." *Bruce*, 939 F.2d at 1054. The defendant was convicted of possession of more than five grams of cocaine base with intent to distribute and use of a firearm in violation of section 924(c)(1).

We reversed the firearm conviction because "the evidence established only that the gun was *intended* to be used for defendant's protection at the time and place of subsequent distribution." *Id.* at 1056 (emphasis original). We reached this conclusion because

> the gun—a small derringer hidden in a belt buckle stored in a paper bag alongside drugs in the pocket of a raincoat hanging in a closet—would clearly appear to be intended for use only at the time of distribution. It is hardly the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house.

Id. at 1055. We were able to distingiush between *present* use and *intended* use because "there was no evidence presented that any distribution of drugs took place at the apartment." Id. at 1056. In other words, because the

defendant was convicted of possession with intent to distribute and not distribution, we concluded that, while the gun might be used to protect Bruce during *future* distribution, it was not being *used* at the time of discovery to protect the drugs. "We do not see how it can be said that under such circumstances the gun is used in relation to the *possession* of the drugs, regardless of the defendant's intention to distribute the drugs subsequently." *Id.* (emphasis original).

In *Derr*, while executing a search warrant for the apartment of the defendant's friend, the police came upon a locked closet. After opening the door to the closet, the police found an unloaded, holstered .357 Magnum revolver and nine rounds of ammunition on top of a pile of miscellaneous items. Directly under the gun, the police located a plastic bag containing a padlocked wooden box. Inside the box, they found 18.4 grams of crack cocaine as well as drug paraphernalia. In other parts of the apartment, they found more drug paraphernalia. Derr, who sometimes stayed in the apartment, was charged with possession with intent to distribute and using a gun "during and in relation to his *possession* of the drugs." *Derr*, 990 F.2d at 1333 (emphasis added). The jury convicted Derr on both counts. We emphasized that a conviction under section 924(c)(1) requires "evidence showing that the firearm actually facilitated the *possession* of the drugs." *Id.* at 1337 (emphasis original). We added: *"When the predicate offense is possession,* it is also insufficient for the evidence to indicate that the gun would be used at a later time in distributing the drugs." *Id.* at 1337 (emphasis added); *see Bruce*, 939 F.2d at 1056.

The majority's reliance on *Bruce* and *Derr* stems from its totally inexplicable statement that "the *primary* drug offense underlying the conviction is possession with the intent to distribute." Majority Opinion at 887 (emphasis added). Nothing could be further from the truth. Robinson was convicted not only of *possession* with intent to

distribute; she was also convicted of *distribution* and *maintenance of a premises for the purpose of distributing drugs,* neither of which convictions she contests. Contrary to the majority's view, *Bruce, Derr* and every other case it cites is inapposite because not one of those cases involved distribution or maintenance convictions.[2] Robinson's uncontested convictions on the distribution and maintenance counts put her in a category wholly separate from Bruce, Derr and the other defendants whose mere possession convictions have led this court to distinguish between present and future intentions, an "exceedingly slippery slope" according to one of my colleagues. *United States v. Morris,* 977 F.2d 617, 623 (D.C.Cir.1992) (Silberman, J., concurring). Whether or not she "used" the gun in relation to her possession of crack with intent to distribute may be, if anything, *irrelevant.* The real question is whether she used the firearm "during and in relation to" her distribution and maintenance offenses.

Among the several inaccuracies contained in the majority opinion is the statement that "[t]he government, for its part, does not argue that Ms. Robinson carried, brandished or otherwise used the derringer during or in relation to the distribution of the drugs to Officer Hale."

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[2] *United States v. Derr,* 990 F.2d 1330 (D.C.Cir.1993) (possession with intent to distribute); *United States v. Morris,* 977 F.2d 617 (D.C.Cir.1992) (same); *United States v. Jefferson,* 974 F.2d 201 (D.C.Cir.1992) (same); *United States v. Williams,* 952 F.2d 418 (D.C.Cir.1991) (same), *cert. denied,* —— U.S. ——, 113 S.Ct. 148, 121 L.Ed.2d 99 (1992); *United States v. Bruce,* 939 F.2d 1053 (D.C.Cir.1991) (possession with intent to distribute and possession); *United States v. Long,* 905 F.2d 1572 (D.C.Cir.) (possession with intent to distribute), *cert. denied,* 498 U.S. 948, 111 S.Ct. 365, 112 L.Ed.2d 328 (1990); *United States v. Evans,* 888 F.2d 891 (D.C.Cir.1989) (same), *cert. denied,* 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990); *United States v. Anderson,* 881 F.2d 1128 (D.C.Cir.1989) (same). The majority parenthetically cites *United States v. Harris,* 959 F.2d 246 (D.C.Cir.) (per curiam) (distribution and conspiracy to distribute), *cert. denied,* —— U.S. ——, 113 S.Ct. 362, 121 L.Ed.2d 275 (1992), which upheld the section 924(c)(1) convictions.

Majority Opinion at 886-87. If the majority means by this statement that Officer Hale did not in fact see Robinson display the firearm, then I do not disagree. If, however, the majority means, as I think it does, that the government admits that there is no evidence to suggest that Robinson used, within the meaning of section 924(c)(1), the firearm when she distributed the crack to Officer Hale, I do not agree.

When a defendant challenges the sufficiency of the evidence to support his conviction, we must defer to the jury's determination and affirm if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *United States v. Long,* 905 F.2d 1572, 1576 (D.C.Cir.), *cert. denied,* 498 U.S. 948, 111 S.Ct. 365, 112 L.Ed.2d 328 (1990). We must "view the evidence in the light most favorable to the government, allowing the government the benefit of all reasonable inferences that may be drawn from the evidence, and permitting the jury to determine the weight and the credibility of the evidence." *United States v. Sutton,* 801 F.2d 1346, 1358 (D.C.Cir.1986); *United States v. Butler,* 924 F.2d 1124, 1126 (D.C.Cir.), *cert. denied,* —— U.S. ——, 112 S.Ct. 205, 116 L.Ed.2d 164 (1991). Supporting evidence can be either direct or circumstantial. *United States v. Kegler,* 724 F.2d 190, 196 (D.C.Cir.1983); *United States v. Carter,* 522 F.2d 666, 681-82 (D.C.Cir.1975). The evidence supporting Robinson's section 924(c)(1) conviction is circumstantial which means that inferences are to be drawn from the relevant circumstances. The most significant circumstance is that the firearm was found together with the crack in Robinson's trunk in her bedroom *the night after she had distributed crack from that location.* Robinson denied she had been in the apartment the night before and the jury disbelieved her. If the jury rejected her testimony regarding her whereabouts on July 15; that rejection can, and does, inform its interpretations and conclusions with respect to the rest of her testimony. A defendant disbelieved

as to one count does not suddenly become a model of credibility with respect to the remaining counts. The jury could have reasonably inferred that Robinson had obtained the crack from her trunk when Officer Hale saw her hand her sister the crack in her bedroom; indeed, according to the evidence, the only crack found in the apartment was in the trunk. The jury could have just as reasonably concluded that the .22 caliber derringer, found with the crack and seized from the locked trunk the next night, was in the same location a short time earlier.[3]

Once the jury concluded that Robinson opened the trunk on July 15, there are only two possible conclusions: either the gun was in the trunk then or it was placed in the trunk between the evening of the 15th and the time of the search on the evening of the 16th. The jury disbelieved her testimony that she never saw drugs in the apartment; it was also free to disbelieve her testimony that she never saw the gun. Moreover, the government is "not required to disprove every conceivable scenario in which appellant would be innocent"; instead, a defendant "is entitled to a judgment of acquittal 'only when there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.'" *United States v. Whetzel*, 589 F.2d 707, 711-12 (D.C.Cir.1978) (quoting *United States v. Davis*, 562 F.2d 681, 683 (D.C. Cir.1977)). Once the jury concluded that the gun was in the trunk with the crack at the time Robinson distributed the crack, it then had to determine whether the gun was "use[d] or carrie[d]"[4] during and in relation to the distribution.

[3] Robinson testified that she had not looked inside the locker since the evening of July 14. But that assertion flowed from her testimony that she did not go home the night of July 15, testimony the jury did not believe.

[4] Although the government does not argue on appeal that Robinson "carried" the gun during and in relation to a drug trafficking crime, the evidence indicates that during the July 15th distribution she carried the gun as well. We have held that "carry" as used in section 924(c)(1) "need not be read in a 'hypertechnical or narrow' way." *United States v. Evans*, 888 F.2d 891, 894 (D.C. Cir.1989) (citation omitted), *cert. denied*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990). A weapon need not be on a defendant's person to convict him of "carrying" a firearm. *Id.* at 895. "[A] jury could properly infer that . . . [the defendant] 'carried' the gun in the sense that it was within reach and available to protect him during his ongoing [drug trafficking offense]." *Id.*

We have held that "[m]ere possession of a gun even by a drug trafficker does not violate the statute." *United States v. Morris*, 977 F.2d 617, 621 (D.C.Cir.1992). Nonetheless, "we have construed the term as broad enough to encompass *any* case in which the gun facilitated or had a role in the trafficking offense." *Id.* (emphasis added). A defendant need not brandish or fire the gun in order to use it. *Id.; see United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992); *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989), *cert. denied*, 494 U.S. 1019, 110 S.Ct. 1325, 108 L.Ed.2d 500 (1990); *United States v. Anderson*, 881 F.2d 1128, 1141 (D.C.Cir.1989).

We have further held that the only limitation on the language in section 924(c)(1) "is that the guns be used 'in relation' to the drug trafficking crime involved, which we think requires no more than that the guns *facilitate the predicate offense in some way.*" *United States v. Harris*, 959 F.2d 246, 261 (D.C.Cir.) (per curiam) (emphasis added), *cert. denied*, —— U.S. ——, 113 S.Ct. 362, 121 L.Ed.2d 275 (1992). The relationship between the firearm and the predicate offense is satisfied

> "[i]f the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor *who had the opportunity or ability* to display or discharge the weapon to protect himself or intimidate others, *whether or not such display or discharge in fact occurred.*"

Id. (emphasis added) (quoting *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir.1985) (Kennedy, J.), *cert. denied*, 484 U.S. 867, 108 S.Ct. 192, 98 L.Ed.2d 144 (1987)); *see also Morris*, 977 F.2d at 623 (same); *United States v. Morrow*, 977 F.2d 222, 231 (6th Cir. 1992) (en banc) (same); *United States v. Vasquez*, 909 F.2d 235, 239 (7th Cir.1990) (same), *cert. denied*, —— U.S. ——, 111 S.Ct. 2826, 115 L.Ed.2d 996 (1991).[5]

Robinson's circumstances easily satisfy the possession or control prong of the test. The jury could have reasonably concluded that she had possession or control of the gun. The police found the gun in her trunk, which she checked every day. The locker was in the closet in her bedroom in her apartment. *See Anderson*, 881 F.2d at 1141.

The gun also facilitated the distribution. The majority observes that because the gun was inside the locked trunk, it "certainly was not easily accessible" or "within 'easy reach,'" Majority Opinion at 888 (quoting *Morris*, 977 F.2d at 623), and therefore could not be used to protect Robinson or her drug stash. From its location in the trunk *next to the drugs*, however, the derringer served two purposes. First, it protected *Robinson* during distribution. While reaching to get the drugs, Robinson could easily grab the small gun without being noticed,

[5] A charge under section 924(c)(1) can be made without separately charging the underlying drug offense. *See United States v. Hill*, 971 F.2d 1461, 1463-64 (10th Cir.1992) (en banc); *United States v. Munoz-Fabela*, 896 F.2d 908, 910-11 (5th Cir.), *cert. denied*, 498 U.S. 824, 111 S.Ct. 76, 112 L.Ed.2d 49 (1990); *United States v. Hunter*, 887 F.2d 1001, 1003 (9th Cir.1989), *cert. denied*, 493 U.S. 1090, 110 S.Ct. 1159, 107 L.Ed.2d 1062 (1990). In fact, a conviction under section 924(c)(1) can stand notwithstanding acquittal on the predicate drug offense. *United States v. Laing*, 889 F.2d 281, 288-89 (D.C.Cir.1989), *cert. denied*, 494 U.S. 1069, 110 S.Ct. 1790, 108 L.Ed.2d 792 (1990); *cf. United States v. Gibbs*, 904 F.2d 52, 55 (D.C.Cir.1990).

providing her with personal protection or allowing her to intimidate others. Using the derringer in this way corresponds with its original use. *See infra* at n. 12. In *United States v. Wilson*, 938 F.2d 785 (7th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 946, 117 L.Ed.2d 115 (1992), the Seventh Circuit concluded "that a defendant intended to use the firarm in facilitation of a drug related crime 'if it [is] strategically located so as to be quickly and easily available for use during a *drug transaction.*'" *Id.* at 791 (quoting *United States v. Whitley*, 905 F.2d 163, 166 (7th Cir.1990) (quotation omitted)) (emphasis in *Wilson*). In *Wilson*, the police, after stopping the defendant, found the gun in the locked trunk of his car. Nevertheless, the Seventh Circuit upheld his conviction under section 924(c)(1) because the gun "was strategically located directly on top of the bag containing the cocaine and the defendant knew where the gun was and it was loaded and readily accessible for use if necessary should any problems arise during the drug transaction." *Id.*; *see also Jefferson*, 974 F.2d at 207 (finding gun was accessible in case of emergency where gun was located in grass-catcher bag next to drugs).[6]

Second, the derringer protected *the drugs* during distribution. Again, the gun's location made it easily accessible during distribution, thus providing protection *at that time*. If Robinson had "'the opportunity or ability to display or discharge,'" *Harris*, 959 F.2d at 261 (quot-

[6] That the gun here may have been unloaded (there was no affirmative evidence one way or the other) and that no ammunition was present are matters of little importance. Many courts have found that an unloaded gun can violate section 924(c). *See, e.g., United States v. Gutierrez-Silva*, 983 F.2d 123, 125 (8th Cir. 1993) (quickly accessible firearm in close proximity to drugs violated section 924(c) even though gun was unloaded and no ammunition was found); *United States v. Hill*, 967 F.2d 902, 905-07 (3d Cir.1992) (easily accessible rifle located next to drugs violated section 924(c) even though gun was unloaded, no ammunition was present and rifle stock was separated from barrel).

ing *Stewart*, 779 F.2d at 540), the gun at the time of distribution, which the jury could have reasonably concluded based on its proximity to the drugs, the jury could have likewise reasonably concluded that the gun " 'facilitated . . . the crime' " by protecting her or the drugs, thereby " 'emboldening' " her to commit the crime. *Id.* (quoting *Stewart*, 779 F.2d at 540).[7]

Moreover, even if her distribution conviction did not support Robinson's section 924(c)(1) conviction, her conviction based on 21 U.S.C. § 856(a)(1) does. The jury found, and Robinson does not contest, that she violated 21 U.S.C. § 856(a)(1) by maintaining a premises to manufacture, distribute, store or use a controlled substance. Although the majority goes to great lengths in its attempt to show that Robinson's apartment was not really a "crack house," its discussion is irrelevant. Whether or not Robinson's apartment fits the usual description of a crack house, the jury found that she maintained her apartment in violation of section 856(a)(1) and she does not challenge that finding.

Maintenance of a premises for the purpose of distributing drugs is not a "passive," *Bruce*, 939 F.2d at 1055,

[7] In *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988), a case cited with approval in *Bruce*, 939 F.2d at 1055, and in *Long*, 905 F.2d at 1578, the Second Circuit stated that "use" in relation to distribution is satisfied by:

> i) Proof of a transaction in which the circumstances surrounding the presence of a firearm suggest that the possessor of the firearm intended to have it available for possible use during the transaction; or ii) The circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction.

Robinson's circumstances satisfy both tests delineated in *Feliz-Cordero*, that is, her distribution conviction fits the first circumstance and her section 856(a)(1) conviction fits the second.

crime like possession. We noted in *United States v. Lancaster*, 968 F.2d 1250, 1253 (D.C.Cir.1992), that

> [s]ection 856(a)(1) makes it unlawful only to "open or maintain any place *for the purpose of* manufacturing, distributing, or using any controlled substance." The "casual" drug user does not run afoul of this prohibition because he does not maintain his house for the purpose of using drugs but rather for the purpose of residence, the consumption of drugs therein being merely incidental to that purpose.

(emphasis added in *Lancaster*). Because it is an ongoing offense,[8] the jury could permissibly conclude that a gun found on the premises was being used "during and in relation to" that offense. And the majority's chief authority, *Bruce*, expressly recognizes this difference:

> If guns are strewn around a "crack house" in which drugs are stored, it might be inferred that the guns are there to protect the occupant's "possession." In such a case, the guns are "used" in relation to the drug trafficking crime of possession with intent to distribute because they are intended to protect the stash of drugs that will subsequently be distributed. And although the actual distribution is a separate crime, courts have treated evidence of use of guns in such a house for protection of the distribution function as equivalent to protection of possession. Since in the typical crack house possession and distribution are intertwined, that seems to us to be a logical interpretation of the statute.

Bruce, 939 F.2d at 1055 (citations omitted).[9] In other words, Robinson used the gun to facilitate ongoing drug

[8] Indeed, we *know* that at least two instances of crack distribution occurred in Robinson's apartment within a twenty-four hour period.

[9] The only difference between the premises described in *Bruce* and Robinson's apartment is the absence in the latter of "guns

trafficking crimes (actual distribution on the premises and maintenance of a premises for the purpose of distributing drugs) and therefore violated section 924(c)(1).[10]

The majority attaches significance to the presence of only one gun to conclude that Robinson did not use the derringer to protect herself or the drugs. We have considered the number of guns present to be a factor in determining usage, *see Morris*, 977 F.2d at 622, and have distinguished between an "arsenal" of guns to protect distribution sites and a single gun. *See United States v. Williams*, 952 F.2d 418, 421 (D.C.Cir.1991). *Compare United States v. Anderson*, 881 F.2d 1128 (D.C.Cir. 1989) *with United States v. Bruce*, 939 F.2d 1053 (D.C. Cir.1991). At the same time, however, we have made

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strewn around." *Bruce*, 939 F.2d at 1055. The danger, if not error, in distinguishing between one gun and more than one gun in an analysis of section 924(c)(1) is discussed *infra*.

[10] The Supreme Court's most recent decision interpreting section 924(c)(1) supports affirming Robinson's conviction. In *Smith v. United States*, —— U.S. ——, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993), the Court, citing, *inter alia*, *United States v. Harris*, *supra*, declared:

> The phrase "in relation to" is expansive, as the courts of appeals construing § 924(c)(1) have recognized. Nonetheless, the phrase does illuminate § 924(c)(1)'s boundaries. According to Webster's, "in relation to" means "with reference to" or "as regards." The phrase "in relation to" thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. As one court has observed, the "in relation to" language "allays explicitly the concern that a person could be" punished under § 924(c)(1) for committing a drug trafficking offense "while in possession of a firearm" even though the firearm's presence is coincidental or entirely "unrelated" to the crime. Instead, the gun at least must *"facilitate, or have the potential of facilitating,"* the drug trafficking offense.

Id., —— U.S. at ——-——, 113 S.Ct. at 2058-59 (citations omitted) (emphasis added).

clear that the use of only one gun violates section 924(c)(1). *See Morris*, 977 F.2d at 622. Section 924(c)(1) requires the use of "a" firearm, not multiple firearms. *See United States v. Freisinger*, 937 F.2d 383, 390 (8th Cir.1991) ("A statute which prefaces the object of the offense with the word 'a' unambiguously authorizes singular units of prosecution.").

On the rare occasion that we have found the use of one gun violative of the statute, the firearm was large and powerful. *See Jefferson*, 974 F.2d at 208 ("a 12-gauge shotgun is a formidable firearm"). But section 924(c)(1) does not require that a gun be of a certain caliber or size to come within the statute.[11] Nor does the use of the firearm have to be successful. A drug defendant's choice of a less effective firearm does not affect his use of it. The reason any firearm no matter its size or firepower violates section 924(c)(1) when used during and in relation to a drug trafficking crime is obvious: Any gun can kill or wound. *See Blank Pistol Kills Actor, The Son of Bruce Lee*, N.Y. Times, April 1, 1993, at A14.

By creating a hierarchy of guns, we encourage a defendant to argue about the characteristics of his firearm in order to establish that it does not come within section 924(c)(1)'s proscription. Indeed, Robinson's counsel asserted at oral argument:

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[11] Section 924(c)(1) does differentiate among firearms in providing for punishment. For example, use of a short-barreled rifle or shotgun increases the punishment from five years' to ten years' imprisonment. If the firearm is "a machine gun, or destructive device, or is equipped with a firearm silencer or firearm muffler," the punishment is thirty years. If the conviction is the defendant's second or subsequent conviction under section 924(c)(1), the punishment increases to twenty years for a firearm other than a machine gun or a firearm that is a destructive device or equipped with a silencer, or muffler. For the latter category, a second conviction results in life imprisonment without release.

> COUNSEL: [The derringer] is basically a joke of a weapon. . . .
>
> THE COURT: Well, now wait a minute. It's not a joke of a weapon, it can kill people—
>
> COUNSEL: Well, it can, if you get lucky—

Disparagement of the derringer ignores reality.[12] Some of my colleagues have referred to the gun as "lowly," *Jefferson*, 974 F.2d at 209, and "ornamental," *Morris*, 977 F.2d at 622. Perhaps they have forgotten it was a derringer that took the life of Abraham Lincoln. *See* George C. Nonte, Jr. Pistol & Revolver Guide 16 (1975).

I have no difficulty concluding that Robinson used the derringer in violation of section 924(c)(1). Accordingly, I dissent.

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[12] The history of the derringer began in the mid 1800s, the age of the riverboat gambler. As one author noted, "[t]he Derringer in the late 19th century was known as the 'gambler's gun,' because it could be hidden up a man's sleeve and flipped into his hand in an instant." Robert Hertzberg, The Modern Handgun 68 (1965). It became popular because it was easy to conceal and was effective in emergency situations. One author described it as

> truly the gun for the ladies' hand bag. It is very small, as was the original Remington from which it was redesigned. It is also an excellent under cover gun for the peace officer or soldier for emergency use, or for anyone for a close range defense gun. The small cartridge is not the best for serious work but is far better than no gun at all and is quite effective at close range where such a gun would be used.

Elmer Keith, Sixguns by Keith 83-84 (1955).

The modern derringer is likewise an effective weapon. The government's expert witness testified that "[t]he first weapon of choice among dealers is a .357 or .44 magnum, or something more powerful than this, but it's still as effective as that .357 or .44 magnum."

Before: MIKVA, Chief Judge; WALD, HARRY T. EDWARDS, SILBERMAN, BUCKLEY, STEPHEN F. WILLIAMS, D.H. GINSBURG, SENTELLE, KAREN LECRAFT HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

Oct. 8, 1993

Appellee's Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full Court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service voted in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is granted and this case will be reheard by the Court sitting *en banc*.

It is FURTHER ORDERED, by the Court *en banc*, that the judgment of the court filed herein on June 18, 1993, is hereby vacated.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-3119, 92-3062

UNITED STATES OF AMERICA

v.

ROLAND J. BAILEY,
Appellant.

UNITED STATES OF AMERICA

v.

CANDISHA SUMMERITA ROBINSON a/k/a
CANDYSHA ROBINSON,
Appellant.

Appeal from the United States District Court
for the District of Columbia
(CR-89-00310-01, CR-91-00453-01)

Argued In Banc March 30, 1994

Decided Oct. 4, 1994

Before EDWARDS, Chief Judge, WALD, MIKVA,* SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG,

* Then-*Chief Judge* MIKVA, a member of the Court when these cases were argued *in banc*, took no part in the disposition.

SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Dissenting opinion filed by Circuit Judge WALD.

Dissenting opinion filed by Circuit Judge STEPHEN F. WILLIAMS, in which Circuit Judges SILBERMAN and BUCKLEY concur.

Separate dissenting statement filed by Circuit Judge SILBERMAN.

GINSBURG, Circuit Judge:

This consolidated case involves two separate challenges, one by appellant Roland Bailey and one by appellant Candisha Robinson, to their convictions under 18 U.S.C. § 924(c)(1). In relevant part, that section imposes a five-year term of imprisonment upon anyone who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." We have long required that in order to support a conviction under § 924(c)(1), the government must demonstrate both a "nexus . . . between a particular drug offender and the firearm." *United States v. Long*, 905 F.2d 1572, 1577 (D.C.Cir.1990), and that "the gun facilitate[d] the predicate offense in some way," *United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992). In order to assess whether the government has made the required showing, we have developed an open-ended test that takes account of numerous factors arguably relevant to whether a gun was used in relation to a drug trafficking offense. *See, e.g., United States v. Derr*, 990 F.2d 1330, 1338 (D.C. Cir.1993); *United States v. Morris*, 977 F.2d 617, 621-22 (D.C.Cir.1992). Applying this test, divided panels of the court affirmed Bailey's conviction, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir.1993), and reversed Robinson's conviction, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993).

Because this complex, open-ended test has produced widely divergent results and because we believe that it intrudes the court into the province of the jury we now replace it with a test that looks to two factors only: the proximity of the gun to the drugs involved in the underlying offense, and the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located. Applying that test, we affirm both convictions.

I. Background

In each of these cases, possession with the intent to distribute cocaine was the predicate drug offense in connection with which the defendant was charged with using or carrying a firearm in violation of § 924(c)(1). The facts of each case are briefly as follows.

A. United States v. Bailey

In May 1989, Roland Bailey was stopped by two Metropolitan Police officers after they noticed that the car he was driving had no front license plate and no inspection sticker. When Bailey failed to produce a driver's license, the officers ordered him out of the car. Before Bailey exited the car, the officers saw him push something between the seat and the front console. Upon searching the passenger compartment of the car they discovered one round of ammunition and 27 small plastic bags containing a total of 30 grams of cocaine. The officers then placed Bailey under arrest; the ensuing search of the trunk of his car turned up a loaded 9-mm. pistol and $3,216 in cash.

Bailey was charged with one drug offense and one other firearms offense in addition to using or carrying a firearm in violation of 18 U.S.C. § 924(c)(1). At trial, Detective Charles DiDomenico, a narcotics expert, testified that weapons such as Bailey's are frequently carried by drug dealers "not only to protect themselves, but [also] to protect their assets, drugs and money." Bailey was convicted by the jury on all charges and was sentenced by the court to two consecutive 51-month sentences of imprisonment on the drug and weapon charges not at issue here, and to a consecutive 60-month term of imprisonment on the § 924(c)(1) conviction.

B. United States v. Robinson

In June 1991, an undercover officer of the Metropolitan Police Department approached Veloria Robinson, the sister of appellant Candisha Robinson, and told her that he wanted to buy crack cocaine. Veloria then took him to an apartment in the northeast quadrant of the city. Candisha opened the door; Veloria told her that the officer wanted something. When Candisha asked what he wanted, he replied that he wanted a "twenty." He then entered the apartment and the Robinson sisters went into the bedroom. He saw Candisha hand Veloria a rock of crack cocaine, which Veloria then sold to him. The next evening, the officer made another controlled buy at the same apartment, this time from a man who claimed that he also lived there.

Shortly after the second controlled buy, a search warrant was executed at the apartment. Inside a locked trunk in the bedroom closet the police found a .22-caliber Derringer, appellant Robinson's 1990 tax return, a letter from her employer, 10.88 grams of crack cocaine, and the marked $20 bill from the first controlled buy. They also found a quantity of plastic baggies in the bedroom.

At trial, Detective David Stroud, a narcotics expert, testified that the Derringer was a "second gun"—that is, a type of gun that a drug dealer might hide on his person for use until he could get to his "real gun." Stroud also testified that drug dealers generally use guns to protect themselves from other drug dealers, the police, and their own employees.

Robinson was convicted by a jury on five separate drug counts as well as on the § 924(c)(1) charge. Including the 60-month term of imprisonment for violating § 924(c)(1), she was sentenced to 157 months of imprisonment, four years of supervised release, and a special assessment of $300.

C. *The Appeals in Bailey and Robinson*

Each defendant appealed his or her § 924(c)(1) conviction on the ground that the Government had failed to adduce sufficient evidence at trial that he or she had "used" or "carried" a firearm in relation to a drug offense. Different panels affirmed Bailey's conviction and reversed Robinson's, in each case over a dissent. Bailey and the government respectively suggested rehearing *in banc*. In order to resolve the apparent inconsistencies in our various decisions applying to § 924(c), we consolidated the two cases and reheard them *in banc*.

II. Analysis

Section 924(c)(1) states that:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

By requiring that the use of the firearm be "in relation to" a drug trafficking offense, the Congress made it clear that it did not intend to criminalize the mere possession of a firearm by someone who commits a drug offense. "[T]he firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, —— U.S. ——, ——-——, 113 S.Ct. 2050, 2058-59, 124 L.Ed.2d 138 (1993). At the same time, it is clear that a firearm need not actually be brandished in order to be used or carried in

connection with a drug trafficking offense. *United States v. Evans*, 888 F.2d 891, 896 (D.C.Cir.1989). As Justice (then Judge) Kennedy wrote for the Ninth Circuit in the seminal opinion on § 924(c)(1):

> If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge occurred, then there is a violation of [the statute].

United States v. Stewart, 779 F.2d 538, 540 (9th Cir. 1985) (internal citations omitted).

A. *Section 924(c)(1) to Date*

In an effort to distinguish between mere possession of and the use or carrying of a gun in connection with a drug trafficking crime, we held early on that more than just evidence of proximity was required to establish "that the gun supported the possession crime." *United States v. Bruce*, 939 F.2d 1053, 1055 (D.C.Cir.1991). By the next year, we were able to state that "a number of factors" may be relevant in any particular case: "courts have identified and will [continue to] identify" such factors. *United States v. Morris*, 977 F.2d 617, 621 (D.C. Cir.1992). Just two years later Judge Wald summarized the development of our case law this way:

> [W]e have enumerated a nonexclusive set of factors to weigh in making that [distinction]. Among other things, we look to whether a gun is accessible to the defendant, whether it is located in proximity to the drugs (which may cut either way depending on the facts of a particular case), whether it is loaded, what type of weapon it is, and, finally, whether there is

expert testimony to bolster the government's particular theory of "use."

Derr, 990 F.2d at 1338 (citing *Morris*, 977 F.2d at 621-22). Thus, in each case in which a defendant challenges the sufficiency of the evidence for his conviction under § 924(c)(1), we have weighed each bit of evidence against him in order to determine whether the defendant could be said to have used (or carried) his gun in furtherance of his drug crime.

Defendants Bailey and Robinson do not attack this open-ended (for convenience *Bruce-Morris-Derr*) approach in determining whether a gun was used during and in relation to a drug trafficking offense. Nor do they question the prior holding of this (and other) court(s) that a gun need not be brandished or displayed in order to be used or carried. Instead, each argues that if this approach were properly applied, he or she could not have been convicted based upon the evidence presented at trial. In response, the government argues that it needs to present evidence only that the defendant possessed a firearm and that the firearm in some way facilitated the drug crime; thus implicitly the Government asks us to abandon the *Bruce-Morris-Derr* approach in favor of a simpler test.

In form the dispute between the parties is little more than a disagreement over the evidence necessary to obtain a § 924(c)(1) conviction; neither side expressly addresses the question of how the disputed element of the crime, *viz.* "use," ought to be defined. In substance, however, this case is about what constitutes use, as opposed to mere possession, of a firearm. Only when we have resolved that question can we determine the quantum of evidence necessary to convict and formulate an appropriate test for assessing whether the government has produced that evidence.

We granted rehearing in order to revisit these issues in the light of our experience using the *Bruce-Morris-Derr*

approach. We do so bearing in mind that because the *Bruce-Morris-Derr* approach represents the established law of the circuit, a due regard for the value of stability in the law requires that we have good and sufficient reason to reject it at this late date. *See McKinney v. Pate*, 20 F.3d 1550, 1565 n. 21 (11th Cir.1994) (*in banc*) (noting that although "the implications of *stare decisis* are less weighty" when an *in banc* court reviews an issue for the first time, "*stare decisis* is a hallmark of our judicial system" and should still be considered by the court *in banc*). In particular, we reconsider our own prior construction of a statute somewhat gingerly as well because " 'unlike in the context of constitutional interpretation . . . Congress remains free to alter what we have done.' " *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 875 (D.C.Cir.1992) (*in banc*) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (internal citations omitted)); *see also Cottrell v. Commissioner*, 628 F.2d 1127, 1131 (8th Cir.1980) (*in banc*) "The doctrine of *stare decisis*, weighty in any context, is especially so in matters of statutory construction.").

We have nonetheless identified at least three factors that justify rejecting established precedent. First, the *in banc* court may properly overrule a prior panel decision if "it decides that the panel's holding on an important question of law was fundamentally flawed." *Critical Mass Energy Project*, 975 F.2d at 876. In this regard, we conclude below that the open-ended *Bruce-Morris-Derr* approach impermissibly intrudes into the province of the jury. Second, when "a precedent [is] a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision," the court is justified in overruling that precedent. *Patterson*, 491 U.S. at 173, 109 S.Ct. at 2371. In this case, even a brief survey of our decisions demonstrates (below) that the *Bruce-Morris-Derr* approach has produced

and will likely continue to produce inconsistent results. Finally, the *in banc* court may overrule a prior precedent interpreting a statute "if it finds that other circuits have persuasively argued a contrary construction." *Critical Mass Energy Project*, 975 F.2d at 876. Again, a survey of the other circuits (also below) demonstrates that they have uniformly adopted a standard different from ours and one that seems more conducive to consistent application.

Preliminarily, therefore, we survey the problems inherent in the *Bruce-Morris-Derr* approach: intrusion into the province of the factfinder, seemingly inconsistent results, and a continuing conflict with the interpretation of § 924(c)(1) adopted by virtually every other circuit.

1. The Province of the Jury

It is a cardinal principle of our system of criminal law that the facts are settled by the trier of fact, be it a jury or a judge, and are not ordinarily to be redetermined by a reviewing court. On appeal from a general verdict finding a defendant guilty, the deference we owe to the trier of fact requires that we draw from the record all inferences that can justifiably be drawn in support of the conviction. Hence, in assessing the sufficiency of the evidence, as an appellate court we must ask not "whether [we] believe[] that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment was supported by substantial evidence." *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362 (1966). Or, as the Supreme Court said in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S.Ct. at 2789 (emphasis in original); *see also United States v. Long*, 905 F.2d 1572, 1576 (D.C.Cir.1990)

("A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation").

Whether a gun was used during and in relation to a drug trafficking offense is, at its core, a question of fact. In a case where the gun was not actually fired or brandished during the commission of the crime, it may well be an ultimate rather than a basic fact, but it is still a question of fact and not of law. Of course, an appellate court may properly determine, as a matter of law, the baseline or minimum conduct that can constitute a "use," and it must determine in each case, with appropriate deference to the jury, whether the record contains sufficient evidence of such conduct. The reviewing court does not sit, however, to make its own finding with respect to an ultimate fact. Weighing the evidence is a function assigned to the jury: "We are not a second jury weighing the evidence anew and deciding whether or not we would vote to convict the defendant." *United States v. Poston*, 902 F.2d 90, 94 (D.C.Cir.1990). Yet the use of an approach that requires the court to weigh numerous factors and to determine the specific relevance of individual facts in order to assess the sufficiency of the evidence invites the court to do just that.

The *Bruce-Morris-Derr* approach strips from the jury its "responsibility [as] the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 307 U.S. at 319, 99 S.Ct. at 2789. For example, in *United States v. Bruce*, 939 F.2d 1053 (D.C. Cir.1991), we were at considerable pains to determine whether a small gun found in the pocket of a coat along with a stash of drugs "was intended for use only at the time of distribution" or was rather "the sort of weapon a drug dealer would employ for protection against an effort to penetrate a crack house." *Id.* at 1055. Determining that the former was more likely true, we reversed the con-

viction. *See id.* at 1056. Similarly, in *Derr* and *Robinson*, the panel struggled to determine for itself the significance of the fact that the defendant's gun was locked respectively in a closet or trunk with a stash of drugs at the time of the defendant's arrest. *See Robinson*, 997 F.2d at 888; *Derr*, 990 F.2d at 1338. Determining the weight to be given a single piece of evidence is not ordinarily an appropriate function for an appellate court.

A due regard for the limits that the jury system necessarily places upon the scope of our review would not lead us to abdicate all our responsibility as an appellate court —for example by affirming any conviction in which a gun is found and there is some connection, no matter how speculative or remote, between the gun and the predicate drug offense. A jury may convict a defendant for any of a number of impermissible reasons, and therefore, if the defendant claims that the evidence against him is insufficient to sustain his conviction, we must as an appellate court review the record conscientiously. *See United States v. Zeigler*, 994 F.2d 845, 849 (D.C.Cir. 1993). Nor does our recognition that the approach heretofore used in this circuit impinges upon the province of the jury by itself predetermine precisely how we ought to review a § 924(c)(1) case. It does, however, strongly suggest that we must replace the open-ended *Bruce-Morris-Derr* approach with a manageable standard; we must, that is, state clearly the minimum showing that the government must make in order to put to the jury the question whether a defendant has violated § 924(c)(1).

2. Inconsistent Results

The open-ended approach described in *Derr* has produced widely divergent and seemingly contradictory results. Panels have upheld convictions where a loaded, sawed-off shotgun was found along with crack cocaine and drug paraphernalia in a lawn clipping bag beneath the exterior stairwell of a house and additional drugs and paraphernalia were found in the defendant's bedroom,

see United States v. Jefferson, 974 F.2d 201 (D.C.Cir. 1992); where loaded pistols were found underneath a sofa cushion and on a bedroom nightstand in the defendant's house, which elsewhere contained crack cocaine in ziplock bags and other drug paraphernalia, *see United States v. Morris*, 977 F.2d 617 (D.C.Cir.1992); and where a loaded 9-mm. pistol was found along with cash in the trunk of the defendant's car after bags of cocaine had been found in the front seat of the car, *see United States v. Bailey*, 995 F.2d 1113 (D.C.Cir.1993). In contrast, panels have reversed convictions where a loaded .22 caliber Derringer was found, along with individual packages of cocaine and marijuana, in a pocket of the defendant's trench coat in the house in which he lived, *see United States v. Bruce*, 939 F.2d 1053 (D.C.Cir. 1991); where an unloaded .357 Magnum revolver was found along with the defendant's birth certificate and a locked box containing cash, crack cocaine, and drug paraphernalia in an apartment in which the defendant was staying, *see United States v. Derr*, 990 F.2d 1330 (D.C.Cir.1993); and where an unloaded .22 caliber Derringer was found in a closet along with crack cocaine and drug proceeds, including marked money, *see United States v. Robinson*, 997 F.2d 884 (D.C.Cir.1993). Although each of these cases can be distinguished on the basis of one or another fact—for example, by looking to the type of gun involved or to how easily the defendant could have grabbed the gun at the time that he was arrested—such distinctions seem counter-intuitive if not arbitrary. Having reflected upon our experience, we think it apparent that the court has failed to take a consistent approach because it has not laid down a standard that yields determinate results in any but the easiest of cases.

3. Conflict with Other Circuits

No other circuit has found our open-ended approach persuasive. Our sister circuits have each adopted a definition of "use" that is considerably broader than firing,

displaying, or otherwise brandishing the firearm. They focus upon whether the evidence concerning the location of the gun is sufficient to permit the jury to conclude that the gun in some way facilitated the predicate drug trafficking offense. From a functional perspective, the standards they have developed for assessing the sufficiency of the evidence are much more similar to the "proximity and accessibility" standard we adopt today than to the open-ended approach that we have used in the past.

The opinion in *United States v. Molinar-Apodaca,* 889 F.2d 1417 (5th Cir.1989) is representative. In that case, police officers executing a search warrant had found a commercial quantity of marijuana in a shed outside the defendant's house; in the house itself, they found an automatic rifle and a semi-automatic shotgun. *Id.* at 1422. In analyzing the defendant's challenge to the sufficiency of this evidence, the Fifth Circuit did not look at such details as whether the guns were loaded or whether they were the appropriate type of weapon to protect an ongoing drug operation. Rather, applying circuit law to the effect "that the government is only obliged to show that the firearm was available to provide protection to the defendant in connection with his engagement in drug trafficking," the court affirmed the conviction.

In the wake of Justice Kennedy's analysis in *Stewart,* the Ninth Circuit applies an equally straightforward test. That court will affirm a conviction under § 924(c)(1) "if [the firearm's] physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest." *United States v. Torres-Medina,* 935 F.2d 1047, 1050 (9th Cir.1991).

Every other circuit similarly focuses, in essence, upon whether the firearm was accessible and proximate to the defendant during the commission of the drug offense. In numerical order by circuit, *see, e.g., United States v.*

Paulino, 13 F.2d 20, 26 (1st Cir.1994) ("[T]he court's critical concern should . . . be whether . . . [the firearm] was 'available for use' in connection with the narcotics trade"); *United States v. Medina,* 944 F.2d 60, 66 (2d Cir.1991) (holding that a conviction may be affirmed "where circumstances indicate that the defendant intended to use the weapon by strategically placing it so that it could be available for use during a drug transaction"); *United States v. Hill,* 967 F.2d 902, 906-07 (3d Cir. 1992) (holding that where the proximity of the gun to the drugs indicated that the defendant's "access to the weapon was unimpeded by distance or other objects," the jury could conclude that the weapon "facilitated [the defendant's] possession of and intention to distribute" illegal drugs); *United States v. Paz,* 927 F.2d 176, 179 (4th Cir.1991) (affirming a conviction because, during the course of defendant's possessory offenses, "the gun was present and accessible, even though under a mattress"); *United States v. Thomas,* 12 F.3d 1350, 1362 (5th Cir.1994) ("The presence of firearms at the home of a defendant where drugs, money, and ammunition are also found . . . is sufficient to establish the 'use' of a firearm as an integral part of a drug-trafficking crime in violation of § 924(c)(1)"); *United States v. Warner,* 10 F.3d 1236, 1239 (6th Cir.1993) (affirming a conviction solely because the firearm was "readily accessible for drug-related protection"); *United States v. Vasquez,* 909 F.2d 235, 240 (7th Cir.1990) (holding that a conviction under § 924(c)(1) is appropriate when guns and drugs are present in the same location, because the "trier of fact [can] reasonably conclude that the availability of firearms instills [in the defendant] a heightened sense of security [while] he posses[es] the drugs with the intent to distribute them"); *United States v. Quintanilla,* 25 F.3d 694, 700 (8th Cir.1994) ("To support a conviction under section 924(c)(1), the government need only establish that a firearm was present and available for use"); *United States v. Torres-Medina,* 935 F.2d 1047,

1050 (9th Cir.1991) ("We hold that a firearm may be considered available [and therefore used by a defendant] for purposes of section 924(c)(1) if its physical proximity to the defendant at any time during the commission of the crime, or during arrest, supports the inference that it emboldened him to commit the underlying offense or to resist arrest"); *United States v. McKinnell,* 888 F.2d 669, 675 (10th Cir.1989) (holding that "the uses element of section 924(c)(1) is satisfied when the defendant has ready access to the firearm and the firearm was an integral part of his criminal undertaking and its availability increased the likelihood that the criminal undertaking would succeed" (internal quotation marks omitted)); *United States v. Poole,* 878 F.2d 1389, 1393 (11th Cir.1989) ("[P]ossession of a firearm constitutes use in relation to the drug trafficking offense if the possession is an integral part of, and facilitates the commission of, the drug trafficking offense"); *see also* Note, *Smith v. United States and the Modern Interpretation of 18 U.S.C. 924(c)(1): A Proposal to Amend the Federal Armed Offender Statute,* 69 NOTRE DAME L.REV. 815, 843 & nn. 187-190 (1994) (noting that "other circuits have specifically rejected many of the factors considered by the D.C.Circuit: size of the gun . . . whether the firearm was loaded, number of weapons, and evidence of past actual use"). *But cf. United States v. Taylor,* 18 F.2d 55, 58 (2d Cir.1994) (noting that the analysis of a sufficiency challenge "is clearly a very fact-intensive question [that] requir[es] a careful examination of, among other things, where the gun was located and what else was found in the apartment").

B. Section 924(c) Henceforth

As the Supreme Court has made clear, the government must make two distinct showings in order to obtain a conviction under § 924(c)(1): "that the defendant 'use[d] or carrie[d] a firearm' " and "that the use or carrying was 'during and in relation to' " a predicate offense.

Smith v. United States, —— U.S. ——, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Therefore, in determining what the proper standard should be, we must determine both what constitutes the use or carrying of a gun and in what circumstances such a use or carrying is in relation to a drug trafficking offense.

1. "Use" of a Firearm

In the context of § 924(c)(1), "use" could be defined either narrowly, so as to encompass only the paradigmatic uses of a gun, i.e., firing, brandishing, or displaying the gun during the commission of the predicate offense, or more broadly, so as to include the other ways in which a gun can be used to facilitate drug trafficking. The narrow definition has the virtue of simplicity; it is, after all, relatively easy to determine whether the defendant's firing, brandishing, or displaying a gun was related to the defendant's contemporaneous (recall the "during" requirement of § 924(c)(1)) drug trafficking offense. The narrow definition also has the vice of simplicity, however; it is too narrow to capture all of the various uses of a firearm that the Congress apparently intended to reach via § 924(c)(1).

Certainly nothing in the statute indicates that the Congress intended to exclude any use from the scope of its prohibition. Indeed, the Supreme Court has said that in § 924(c)(1), the "Congress employed the term 'use' expansively." *See Smith,* —— U.S. at ——, 113 S.Ct. at 2058. Wherefore, it held that the statute prohibits the "use" of a firearm even as an object that can be bartered for drugs. *See Smith,* —— U.S. at ——, ——, 113 S.Ct. at 2055, 2057.

Like firing, brandishing, or displaying a gun, barter involves handling the gun. A gun can surely be used even when it is not being handled, however. For example, a gun placed in a drawer beside one's bed for fear

of an intruder would, in common parlance, be a gun "used" for domestic protection.

This more inclusive understanding of "use" has long been recognized in the jurisprudence of the Supreme Court. In *Astor v. Merritt,* 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884), the Court was required to interpret a customs statute that exempted from duty "[w]earing apparel in actual use . . . of persons arriving in the United States." *Id.* at 203, 4 S.Ct. at 413. The petitioner sought an exemption for clothing that he and his family had purchased abroad, but not yet worn. The Court accepted his argument:

> If a person residing in the United States should purchase wearing apparel here, in a condition ready for immediate wear without further manufacture, intended for his own use or wear, suitable for the immediately approaching season of the year, and not exceeding in quantity, quality or value the limit above mentioned, no one would hesitate to say that such wearing apparel was 'in actual use' by such person, even though some of it might not have been actually put on or applied to its proper personal use. . . . An article of wearing apparel, bought for use, and appropriated and set apart to be used, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards.

Id. at 213, 4 S.Ct. at 419. Likewise, in *Smith,* the Court noted with approval the following definition of the verb "to use": " '[t]o make use of; to convert to one's service; to avail oneself of; to utilize; to carry out a purpose or action by means of.' " *Id.* —— U.S. at ——, 113 S.Ct. at 2054 (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).

In the context of § 924(c)(1), therefore, we hold that one uses a gun, i.e., avails oneself of a gun, and therefore violates the statute, whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and when needed to facilitate a drug crime. In a case where the predicate offense involves the distribution of drugs, the government must show that the defendant had the gun in such a place at the time that the drugs were being distributed. In a case when the predicate offense is possession with the intent to distribute drugs, however, the government need not prove that the gun was in that place during the entire period that the defendant illegally possessed the drugs or that it was in that place at the time that the defendant was arrested. Because possession with the intent to distribute is a continuing offense—that is, an offense that extends through time—the government need only prove that the defendant put or kept the gun in that place at some point while the defendant illegally possessed the drugs.[1]

2. "During" and "In Relation To"

Once it is determined that the defendant has used or carried a gun, the more difficult question is whether he has done so "in relation to a drug trafficking offense."

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[1] Invoking *United States v. Ray,* 21 F.3d 1134 (D.C.Cir.1994), and the Solicitor General's brief in *McLaughlin v. United States,* 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the dissent proposes that one may "use" a firearm in connection with a drug trafficking offense only by displaying it or, if the weapon is concealed, by threatening to use it. Judge Williams' Dissenting Opinion pp. 123-25. This ignores that how one "uses" a weapon in a crime necessarily depends upon the nature of the crime. *Ray* and *McLaughlin* were aggravated bank robbery cases, interpreting 18 U.S.C. § 2113(d). Of course one must somehow threaten another with a dangerous weapon in order to commit that offense. But it is senseless to say the same of crimes involving possession of drugs. Those are furtive crimes. Stealth is essential to their success. If, as expected, the drugs are secreted, one should expect the firearms to be as well.

As the Court noted in *Smith*, this requirement "at a minimum, means that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." —— U.S. at ——, 113 S.Ct. at 2059. For the statute to be violated, therefore, the gun "must 'facilitat[e] or ha[ve] the potential of facilitating' the drug trafficking offense." *Id.* (quoting *Stewart*, 779 F.2d at 540) (alterations in original). Using a gun to protect one's drugs, drug sales is therefore clearly a prohibited use of the gun. Our prior decisions under § 924(c)(1) recognize as much.

The First Circuit refers to this relationship quite generally as a "facilitative nexus." That court looks only to whether the gun was "kept [where it was] to be available for use" in an ongoing drug offense. *See, e.g., United States v. Paulino*, 13 F.3d 20, 26 (1st Cir.1994). The court's rationale is readily explained: once a person acquires a firearm and puts or keeps it where it can be used more actively in his drug activity, that firearm becomes a part of the drug activity and thus is used by the defendant in relation to the drug activity. It matters little whether the use is described in terms of emboldening the defendant to commit the drug trafficking crime, *see, e.g., Stewart*, 779 F.2d at 540, protecting the defendant's possessory interest in his drugs, *see, e.g., United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir.1990), or otherwise; any way one puts it, the firearm is being used as part of the drug activity. Therefore, like the First Circuit, we look to whether the gun was positioned so as to be available for use during ongoing drug activity in order to determine whether the use was within the scope of § 924(c)(1).

Note that in order to relate to a drug trafficking offense, the use of the gun need not actually have furthered the offense. As the Supreme Court said in *Smith*, the gun need only "ha[ve] the potential of facilitating" the drug trafficking offense. Indeed, the Supreme Court has consistently held that "[t]he ordinary meaning of the words ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.' " *Morales v. Trans World Airlines, Inc.*, —— U.S. ——, ——, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)); *see also District of Columbia v. Greater Washington Board of Trade*, —— U.S. ——, ——, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992) (noting that when the Congress uses the phrase "relates to," it has chosen " 'deliberately expansive' language" (quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987))). The Congress's use of that phrase here was clearly deliberate and an indication that it intended § 924(c)(1) to be a broad prohibition, reaching more than conduct that actively advances the underlying predicate drug offense.

The legislative history of § 924(c)(1) reveals that the Congress expressly retained the "in relation to" requirement in preference to a more restrictive "in furtherance of" requirement. One bill that passed the Senate as part of the legislative process that culminated in the enactment of the current version of § 924(c)(1) would have penalized "[w]hoever, during and in relation to any [one of a number of enumerated drug] felon[ies] . . . uses a firearm, or carries a firearm in furtherance of such crime. . . ." 131 Cong.Rec. 18,155, 18,235 (July 9, 1985) (reprinting S.49, a predecessor bill, as passed by the Senate). The Bureau of Alcohol, Tobbaco, and Firearms criticized this proposal, however. Referring to the then-current version of § 924(c)(1), it argued that because "existing law already requires that the carrying be 'in relation to' the underlying crime," the proposed bill would "weaken[] the existing mandatory penalty provision." 4 U.S.C.C.A.N. 1327, 1346 (1986). Therefore, the "in furtherance of" requirement was deleted. This suggests that the Congress carefully avoided any implication that it intended to nar-

row the relationship that must be shown between the gun and the predicate offense in order to support a conviction under § 924(c)(1).

In sum, it is apparent that positioning a firearm in such a way that it protects or is otherwise integrated into one's drug trafficking is not just a use of that gun, but is a use of that gun in relation to a drug trafficking offense and is therefore covered by the statute. What, then, is sufficient evidence that a gun found at the scene of a drug crime is being used in this way?

Whenever there is sufficient evidence for a jury to find that the defendant at some time during the commission of the predicate drug offense put or kept a firearm in a place where it would be proximate to and accessible from a place that is clearly connected to his drug trafficking (*e.g.*, a place used to store, manufacture, or distribute drugs, or to keep the proceeds of drug transactions), the jury may also infer that the gun was being used to protect the drug trafficking operation, and was therefore being used in violation of § 924(c)(1). We emphasize that the jury may draw this inference regardless whether the predicate offense is one of drug distribution or of possession with intent to distribute drugs; we reject any suggestions to the contrary in our prior opinion. *Cf. Bruce*, 939 F.2d at 1055 ("Since possession with intent subsequently to distribute is in a sense a passive crime, it becomes somewhat difficult analytically to determine how one goes about using a gun in relation to that crime"). As the Eighth Circuit has stated:

> It has become common knowledge that drug traffickers typically keep firearms available to protect themselves and their drugs and drug money. The presence and the availability of the firearms are often crucial to the "success" of the drug enterprise. It is therefore permissible for juries to infer that firearms found among a drug trafficker's paraphernalia are used to further the drug venture and are thus used during and in relation to drug trafficking within the meaning of section 924(c)(1).

United States v. Young-Bey, 893 F.2d 178, 181 (8th Cir.1990).

Obviously, a defendant is free to present evidence that he possessed the gun solely for a different purpose—for example, as part of a collection of guns that just happened to be kept in a place that later became involved in drug trafficking. *See, e.g., United States v. Vincent*, 20 F.3d 229, 234-35 (6th Cir.1994) (noting that defendant had argued that he was a gun collector); *United States v. Morrow*, 923 F.2d 427, 535 (6th Cir.1991) (noting that defendant had "strenuously argued at trial that the only purpose for the gun was to shoot snakes"). It will be the duty of the trier of fact, however, and emphatically not of this court, to weigh all such evidence and to determine whether, as a matter of fact, the weapon was being used as part of a drug trafficking operation.

This test for use is not only an accurate means of ensuring that the scope of § 924(c)(1) is as broad as the Congress intended it to be; it will also avoid the problems with the *Bruce-Morris-Derr* approach that we outlined above. First, as we have already noted, placing or keeping a gun in such a way that it protects a drug trafficking operation is clearly a "use" of a gun "in relation to a drug trafficking offense." In most cases, the gun's proximity to and accessibility from the actual site of the defendant's drug trafficking will be the most probative evidence that the defendant was using the firearm to protect his drug trafficking. Similarly, whether the defendant carried the gun with, or to or from the location of, the drugs will be the most probative evidence that he carried it during and in relation to a drug trafficking offense. Second, this test can be readily administered both by the district court, which must determine whether the Government's case may go to the jury, and by the appellate panel that must determine whether the evidence

was sufficient to support a conviction under § 924(c)(1). As such, it will assure greater uniformity across cases while penalizing more precisely the conduct that the Congress intended to reach.

C. Application of the Standard

Applying the standard for "use" to the present cases, we hold that the Government presented sufficient evidence to convict both Bailey and Robinson. When Bailey was arrested, there were 30 grams of cocaine, more than $3,200 in cash, and a loaded 9-mm. pistol in his car. He was properly convicted of possession with the intent to distribute the cocaine. Because the gun was found in the same place as the cash (namely, the trunk) and in the same car as the drugs that formed the basis of his drug trafficking conviction, the jury was entitled to infer that the money was the proceeds of an ongoing drug operation. The requirements of proximity and accessibility were both satisfied. The gun was proximate to the drugs and was easily accessible to Bailey at any time that he was handling either the drugs or the proceeds of the sale. The jury could reasonably infer that Bailey had intentionally incorporated the gun into his drug operation, was using it as part of that operation, and was therefore using it in relation to his possession with intent to distribute the drugs. Although the record does not demonstrate that Bailey had made a specific drug sale (the amount of money he had notwithstanding), there is little reason to doubt that he was using the gun in relation to the possessory offense regardless whether the gun actually furthered the possessory offense or emboldened him to commit that offense. It is enough that the jury was entitled to conclude that Bailey had put the gun into the car not for some unrelated purpose but because he was keeping drugs there; that alone establishes that the gun was used in relation to Bailey's drug trafficking offense. We therefore affirm his conviction.

The same analysis requires that we affirm Robinson's conviction. In her case, the firearm was found in the same locked trunk as were the drugs that formed the basis of her conviction for possession with intent to distribute. Again, the requirements of proximity and accessibility are obviously satisfied: The gun was proximate to the drugs, and it was accessible to anyone, such as Robinson, who had access to the drugs. Because the jury found beyond a reasonable doubt that the drugs were Robinson's—a finding not at issue here—it could also infer from these facts that Robinson placed or kept the gun in the same location as the drugs in order to protect her possession of the drugs. Hence, the jury was entitled to conclude that Robinson used the gun in relation to the drug trafficking offense.

III. Conclusion

In sum, we reject the open-ended *Bruce-Morris-Derr* approach and conclude instead that in order to survive a challenge to the sufficiency of the evidence for a conviction under § 924(c)(1), the Government need only point to evidence that the firearm in question was in proximity to the drugs, drug paraphernalia, or drug proceeds and was accessible to the defendant from the site of the drugs, drug paraphernalia, or drug proceeds involved in his or her predicate drug trafficking offense. When there is evidence of proximity and accessibility, we will affirm a conviction under § 924(c)(1). Because the government presented such evidence at the trials of both Bailey and Robinson, the judments of conviction in each case are

Affirmed.

WALD, Circuit Judge, dissenting:

There are four reasons why I believe the majority's bright line test for determining whether a gun has been "used" to commit a drug offense is wrong. First: Although I agree that "use" under 18 U.S.C. § 924(c)(1) requires the government to show that the gun in some way "facilitated" the defendants's commission of the underlying drug offense, *see United States v. Jefferson*, 974 F.2d 201, 205 (D.C.Cir.1992), the sticking point is what kind of evidence it takes to make that showing. The *Bruce-Morris-Derr* line of cases did not in that sense set forth any test or formula for making such a determination; rather, it provided only a list of potentially relevant factors, *i.e.*, the type of weapon involved, whether it was loaded, the presence of expert testimony to support the government's theory of "use," the proximity of the gun to the drugs, and the accessibility of the gun to the defendant. By focusing on only two of the factors—(1) proximity of guns to drugs, drug paraphernalia, or drug proceeds and (2) accessibility of the guns to the defendant from a place used to store drugs, drug paraphernalia, or drug proceeds—to the exclusion of any other relevant factors, the majority in my view diminishes rather than enhances the prospect of accurate assessment on a case-by-case basis as to whether the gun was used to facilitate the drug offense. Congress, it should be noted, created no statutory presumption that "use" automatically would follow from the presence of any particular factors, and I can find no authority for courts to do so.

Rather than furnishing a clear and predictable guide for judges and juries, the majority's new "proximity and accessibilty" test offers only a straightjacket from which judges must inevitably strain to escape, as they are confronted with a steady stream of new fact situations. But the circumstances at which they must look to justify any exception will almost certainly be the very factors mentioned in the much-maligned *Bruce-Morris-Derr* cases, *i.e.*, *United States v. Bruce*, 939 F.2d 1053, 1055-56

(D.C.Cir.1991), *United States v. Morris*, 977 F.2d 617, 62-22 (D.C.Cir.1992), and *United States v. Derr*, 990 F.2d 1330, 1338 (D.C.Cir.1993)—the size and type of the gun, whether it was loaded, and the presence or absence of ammunition. Succumbing to "certainty's siren call," the majority would prohibit a reviewing judge from looking at any of these factors in deciding whether there was enough evidence in a particular trial record to justify an inference that the defendant used the guns to facilitate the drug offense.

Second: Because the majority's ruling in this *in banc* decision will predictability be promptly reduced to new jury instructions, it seems passing strange to say that the proximity and accessibility test minimizes interference with jury discretion. *See* Opinion ("Maj.Op.") at 111-12. What the majority is actually doing is artificially limiting the factors that the jury may legitimately consider when determining whether a defendant "used" a firearm during and in relation to the underlying drug offense. In so doing it is impermissibly curbing the jury's discretion to consider the totality of circumstances that might be relevant to that fact-bound determination.

Third: The new test is not only unduly rigid, it is not even clear. I cannot fathom how the accessibility prong, as defined by the majority, will work, or what indeed it adds to the minimal proximity test. It seems that whenever the guns are located proximately to the drugs, they must also be potentially accessible to the defendant *from the place the drugs are being stored*. Op. at 115. Thus if the guns and drugs are found altogether in a locked strongbox and the defendant is miles away, under the majority's test, the guns are arguably accessible to the defendant from the place where the drugs are stored and are being "used" to facilitate the possession of the drugs. To state the proposition is to reveal its illogic. Under the statute it is the defendant who must use the gun, so it is the accessibility of the gun to him at the time of

the drug offense charged that is relevant, not the accessibility of the gun to a phantom defendant who is positioned where the drugs are. This latter definition of accessibility makes no sense whatsoever. Indeed, the majority's peculiar definition of accessibility renders their "use" test much looser than that endorsed by several other circuits, which at least focus on whether the guns were proximate to the defendant as opposed to merely accessible from the place where the drugs, drug paraphernalia, or drug proceeds are stored. *See, e.g., United States v. Theodoropoulos,* 866 F.2d 587, 597-98 (3d Cir.1989) (guns located in trash can on back porch of apartment not proximate enough to defendant to fit within § 924(c)); *United States v. McKinnell,* 888 F.2d 669, 675 (10th Cir.1989) ("use" element of § 924(c)(1) met when defendant had "ready access" to firearm, which was located within easy reach of defendant).

Fourth: In those cases like Bailey's that involve the distribution or actual possession of drugs, application of the new proximity and accessibility test or the old relevant factors approach of *Bruce-Morris-Derr* will not likely make much difference. But in the trickier cases where the crime being charged is possession with intent to distribute and the defendant himself is not in the immediate vicinity of the scene where the drugs and guns are found, the majority's test can produce a ridiculous result. This was the situation in *Derr* and *Robinson.* In *Derr,* 990 F.2d at 1332, and *Robinson,* 997 F.2d 884, 885 (D.C. Cir.1993), the defendant was not even in the same room as the unloaded guns, which were secreted along with the drugs in a locked place (closet in *Derr,* footlocker in *Robinson*). The crime was possession (constructive) with intent to distribute and the issue in both cases was whether the gun was being used to facilitate that possession. Although the majority would presumably find sufficient evidence to convict under § 924(c)(1) in both cases because the guns were proximate to the drugs and would have been accessible to each defendant once he

or she reached the place where the drugs were being stored, I do not see how this result can be right. A defendant cannot have been "using" a gun to protect drugs when he was nowhere near the gun. A robber or competitor drug dealer who broke into the apartment would have been able to force the lock open without an iota of fear from the gun within because no one was there to use it.

I agree with Judge Williams that we must honor the ordinary meaning of words used by Congress, *see Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); section 924(c) requires us to ask whether the gun was used to commit the drug trafficking crime for which the defendant was convicted, not whether the gun might have been used at some past or future time to commit some other past or future drug trafficking crime. *See Bruce,* 939 F.2d at 1055. To answer the right question, the jury and a reviewing court needs access to all relevant information in order to replicate the real life scenario involving the guns, the drugs, and the defendant so that it can then decide if the defendant was in fact using the gun to facilitate the drug offense. The majority effectively leaves out the defendant altogether in its streamlined test; unfortunately, in so doing it distorts the plain meaning of the law, dispenses with logic, and invades jury discretion as well.

Finally, while I find Judge Williams' narrower interpretation of "use" quite persuasive, I cannot go so far as to agree that an actor who has intentionally placed a gun within easy access of his person in order to guard or to distribute drugs is not using the gun to facilitate the drug offense unless he openly brandishes, displays, or makes verbal threats about the gun. Where evidence of ready access to a gun by the defendant guarding or distributing the drugs exists, I think the jury can fairly draw the inference that such access is an intrinsic part of the criminal drug trafficking act. But conversely, I do not, like

the majority, think it a fair inference that where the defendant has no such ready access to the gun, but instead is shown merely to be in constructive possession of the drugs which are located near the gun but away from the defendant, he is nonetheless using the gun to facilitate his possession or distribution. That I believe to be the principal difference between the other dissenters and myself, since I agree with them that "use" involves activity of some sort by a defendant who is in the immediate vicinity of the weapon, and not mere placement of the weapon near the drugs. That difference, however, is of sufficient import so as not to allow me to subscribe to Judge Williams' bright line rule any more than the majority's. Bright lines have a place in our jurisprudence but primarily with respect to what third parties like policemen or citizens can do without running afoul of the law. They are distinctly less useful in telling juries or judges what kind of evidence will suffice to show that a defendant is guilty of a generic crime that can be committed against a thousand different factual backdrops.

Because I believe that there was sufficient evidence to support Bailey's conviction for use in relation to actual possession of drugs with intent to distribute, *i.e.*, the gun in the trunk of the car was readily accessible to protect the drugs in the passenger compartment, but not Robinson's, *i.e.*, there was proof only of drugs and an unloaded gun in a locked trunk in a bedroom closet, I would affirm the first conviction and reverse the second. I would not adopt the majority's proximity and accessibility test but would instead continue to allow juries and judges to rely on all relevant factors to decide each case.

STEPHEN F. WILLIAMS, Circuit Judge, with whom SILBERMAN and BUCKLEY, Circuit Judges, join, dissenting:

Nearly all of our sister circuits say that mere possession of a firearm does not constitute "use" under 18 U.S.C. § 924(c). In the same breath, however, all—joined today by this court—allow conviction without evidence of the defendant's firing, brandishing, displaying or actively using the firearm in any way.[1] In joining the other circuits, the court undoubtedly simplifies our previous vague multifactored balancing test for review of § 924(c) cases for sufficiency of the evidence. And the majority is surely right that it is perfectly appropriate to overturn statutory interpretations where, as here, the precedent rejected is "fundamentally flawed", *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 876 (D.C. Cir.1992) (en banc), and of course especially where, again as here, the precedent acts as "a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision". *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 2371, 105 L.Ed.2d 132 (1989)). In recent years, our cases have produced such inconsistency largely because we have failed to identify a clear definition of the term "use" of a firearm; it is that failure that has led to our frequent second-guessing of juries. In attempting to mend the incoherence of our previous approach by articulating a "proximity" plus "ac-

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[1] Maj. Op. at 113-14. For a representative sampling, see *United States v. McFadden*, 13 F.3d 463, 465 (1st Cir.1994); *United States v. Breckenridge*, 782 F.2d 1317, 1322-23 (5th Cir.1986); *United States v. Lyman*, 892 F.2d 751, 753 (8th Cir.1989); *United States v. Harmon*, 996 F.2d 256, 258 (10th Cir.1993); *United States v. Poole*, 878 F.2d 1389, 1393 (11th Cir.1989). Other circuits are more honest. *United States v. Meggett*, 875 F.2d 24, 28 (2d Cir.1989) ("mere possession of a gun can constitute use"); *United States v. Torres-Rodriguez*, 930 F.2d 1375, 1385 (9th Cir. 1991) (same).

cessibility" test, however, the court has in effect diluted "use" to mean simply possession with a floating intent to use. In all but the rarest case, then, a defendant will be subject to punishment under § 924(c) if guilty of a drug trafficking offense and, while committing the offense, was in possession of a firearm. I think the wording, history and context of § 924(c) call for a different bright-line rule—one requiring active "use" rather than possession with a contingent intent to use.

* * * *

Section 924(c) imposes five additional years of punishment on

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . *uses* or carries a firearm.

18 U.S.C. § 924(c)(1) (emphasis added).

The word "use" in ordinary language normally implies activity. Cf. *United States v. McFadden,* 13 F.2d 463, 467 (1st Cir.1994) (Breyer, J., dissenting) ("the ordinary meanings of the words 'use' and 'carry' . . . connote activity beyond simple possession"). The majority asserts that a gun placed in one's drawer with an intent to use it in the event of an intruder is "in common parlance, [] a gun 'used' for domestic protection". Op. at 114. This is possible in some contexts, but they are contexts in which the fact of "use" is *assumed*. Q: "What do you use the gun for?" A: "I use it to protect my family." In that hypothetical the answerer accepts the questioner's premise that the gun is in some sense used. But as the question assumes something that is not established, the answerer might well go back to the premise: A: "Actually, I've never had to use it. I keep it here in case of an intruder."

In support of its sweeping idea of the plain meaning of "use", the majority cites *Astor v. Merritt,* 111 U.S. 202, 4 S.Ct. 413, 28 L.Ed. 401 (1884). The case illustrates the importance of context. The plaintiff, William Astor, sought a refund of customs duties of $1,880 (in 1878 dollars) paid on clothing he had purchased in Europe for personal use but had not yet worn at the time he re-entered the United States. The statute provided an exemption for "[w]earing apparel in actual use and other personal effects (not merchandise), . . . of persons arriving in the United States", *id.* at 203, 4 S.Ct. at 413 (citing § 2505 of the Revised Statutes, p. 489, 2d ed.), and the government had prevailed below by arguing that "actual use" required that each particular item of clothing have been worn before importation. The Court instead found that the term "actual use" must be read in light of the basic distinction drawn by the statute between articles that are "personal effects of [the traveller], and not merchandise, and not for sale," *id.* at 214, 4 S.Ct. at 419, and thus sought a meaning for "actual use" that, "while it comports with the ordinary habits of passengers and travellers, will not open the door for fraud." *Id.* Any meaning that required past wearing was plainly incompatible with that purpose. No such incompatibility with statutory purpose is created by reading "use" in § 924(c) to require some sort of active use, as opposed to simple possession with a view to possible future use. Aside from *Astor*'s emphasis on context, its expansive interpretation of the word "use" to protect travellers hardly raises the same issues as does an expansive interpretation of a term in a criminal statute.

Part of that context consists of § 924(c)'s origins. The initial version, passed in 1968, reads as follows:

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

> shall be sentenced to a term of imprisonment for not leses than one year nor more than 10 years.

Pub.L. No. 90-351, 82 Stat. 233 (1968). In its 1968 form, the statute suggests that Congress had active employment of a weapon in mind. The phrase "uses *to commit*" implies that the defendant derived actual service from the weapon in completing an unlawful act. This service might take the form of injuring one's opposition by firing it, intimidating opponents by displaying or brandishing it, or offering it in exchange to complete an unlawful commercial transaction. It does not, however, imply merely potential service—i.e., keeping it hidden from view, intending to use it only if a contingency should arise. For the gun in that instance has not actually been used to commit the crime; its only function is to make successful completion more probable under contingencies that have not arisen.

In 1984, Congress made two basic changes: it raised the sentence enhancement to exactly five years and it both broadened and narrowed the scope of predicate offenses from "any felony" to "any crime of violence". At the same time, it collapsed the two clauses into one, substituting the phrase "during and in relation to" the predicate crimes for the earlier provisions linking the firearm to the predicate crimes. The statute then read:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub.L. No. 98-473, 98 Stat. 2138 (1984). Congress gave two reasons for rewriting the statute, neither of which pertained to the scope of the term "use" or "carry". S.Rep. No. 225, 98th Cong., 2d Sess. 1, 312-13, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3490-91 ("Part D of title X represents a complete revision of subsection 924(c) *to overcome the problems with the present subsection discussed [below]*") (emphasis added). First, it sought to clarify the statute's approach to suspended and concurrent sentences. Second, it wished to overcome the Supreme Court's holdings in *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), and *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed. 2d 381 (1980), which negated the use of § 924(c) when another firearm penalty enhancement provision, such as that for armed robbery under 18 U.S.C. § 2113(d), applied. The government points to no evidence that in 1984 Congress sought to expand the meaning of "use". Moreover, Congress's adoption of the connective phrase "during and in relation to" could not have been intended to adjust for evolving problems of passive drug crimes; Congress only added drug trafficking offenses as predicate crimes in 1986. Pub.L. No. 99-308, 100 Stat. 456 (1986).

Moreover, the Senate Report relating to the 1984 change gave examples of use, both of them active: "pointing it at a teller or otherwise displaying it whether or not it is fired." S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. While these examples were not presented as exhaustive, they provide insight into the general class of behavior Congress had in mind. Even more indicative is the Senate Report's commentary on the "carry" provision which reads:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant *intended to use* the gun if a contingency arose or to make his escape. . . . Moreover, the requirement that

> the firearm's use or possession be "in relation to" the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight.

Id. at 3492 n. 10 (emphasis added). The reference to intended use shows that Congress envisioned the "carry" provision to punish a defendant who did not "display" or otherwise actively use the firearm, but who had at least taken the active step of carrying the gun on a drug trafficking foray. Thus the Senate evidently saw "use" as a comparatively narrow term, with "carry" picking up cases of an alternative type of activity, where the defendant did not actively "use" the weapon. The majority has turned this relation around, giving "use" such a broad meaning as to leave no apparent role for "carry".

Another element of § 924(c)'s context is the kindred provision, § 924(d), adopted in its original form in 1968, four months before the original § 924(c) "use or carry" provision. Pub.L. No. 90-351, 82 Stat. 233 (1968). The current version of § 924(d) provides for forfeiture of firearms "used in any knowing violation" of certain enumerated offenses (such as unlawful interstate transport and false statements in acquiring firearms), and of firearms "intended to be used" in other enumerated offenses (such as crimes of violence and drug trafficking crimes). 18 U.S.C. § 924(d)(1). Thus Congress, clearly quite alert to the distinction between firearms "used" in commission of a crime and merely "intended" for such use, provided for forfeiture *before* the weapon was used in drug trafficking, to nip the risk in the bud, apparently saving § 924(c)'s five years additional imprisonment for cases of actual use. "[U]sing a firearm" should not have a "different meaning in § 924(c)(1) than it does in § 924(d)". *Smith v. United States*, —— U.S. ——, ——, 113 S.Ct. 2050, 2057, 124 L.Ed.2d 138 (1993).

Smith also observed, to be sure, that "it is clear from § 924(d)(3) that one who transports, exports, sells or

trades a firearm 'uses' it within the meaning of § 924(d)(1)". *Id.* The Court inferred this from the specific statutes as to which § 924(d)(1) creates forfeiture liability, including, for example, 18 U.S.C. § 922(a)(5) (unlicensed transfer of a firearm to a resident of a different state); *id.* § 922(*l*) (importation of firearms). See *Smith*, —— U.S. at —— n. *, 113 S.Ct. at 2057 n. *. All of these, some of which the Court generalized under the word "transport", will nearly always involve active manipulation of the firearm. Given § 924(c)'s explicit "carry" provision, the parallelism inferred by the Court in *Smith* may not be complete. That does little, I think, to undermine § 924(d)'s value in evidencing congressional alertness to the difference between "use" and intent to use.

Congress was also explicitly conscious of the relation between § 924(c) and 18 U.S.C. § 2113(d), which provides sharply increased penalties for one who, committing a bank robebry or theft in violation of 18 U.S.C. § 2113(a) or (b), "assaults any person, or puts in jeopardy the life of any person by the *use* of a dangerous weapon or device". 18 U.S.C. § 2113(d) (emphasis added). The Senate Report in 1984 mentioned § 2113(d) and made clear that it intended that some defendants might be subject to *both* enhancements. S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3492. In his brief before the Supreme Court in *McLaughlin v. United States*, 476 U.S. 16, 106 S.Ct. 1677, 90 L.Ed.2d 15 (1986), the Solicitor General of the United States used that history to sketch out a view of the intended meanings of "use" and "carry" in § 924(c). In *McLaughlin*, where the court held that an unloaded gun could be a "dangerous weapon" under that statute, the Solicitor General argued that weapons that are concealed and unmentioned do *not* suffice for conviction under the aggravated robbery statute (18 U.S.C. § 2113(d)) because "the robber has not 'used' the weapon to 'assault' anyone". Brief for the United States at 19,

McLaughlin (No. 85-5189). He went on to press the point about the relative narrowness of the word "use" and the parallelism between § 924(c) and § 2113(d):

> *It appears that Congress is of the view that something more than the carrying of a gun is required to establish its use.* In response to this Court's decisions[,] *Simpson v. United States*, 435 U.S. 6 [98 S.Ct. 909, 55 L.Ed.2d 70] (1978), and *Busic v. United States*, 446 U.S. 398 [100 S.Ct. 1747, 64 L.Ed.2d 381] (1980), Congress amended 18 U.S.C. [§] 924(c) in 1984 to provide an additional penalty of five years' imprisonment for anyone who "uses or carries" a firearm during a crime of violence, including a "crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." Thus, the additional penalty of Section 924(c) now applies even though the defendant is convicted under a provision like Section 2113(d) that provides for an enhanced penalty for the use of a dangerous weapon or device. In spelling that out in the legislative history, in fact, Congress used Section 2113(d) as an example, stating that a person convicted under Section 2113(d) would also be subject to five years' imprisonment under Section 924(c) if the dangerous weapon or device was a firearm. S.Rep. 98-225, 98th Cong., 1st Sess. 313-314 (1983). In its example, the Senate report referred to "using a gun * * * by pointing it at a teller or otherwise displaying it." *Id.* at 314 [1984 U.S.C.C.A.N. 3492]. In a footnote, the report noted that "evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm" under Section 924(c). S.Rep. 98-225, *supra*, at 314 n. 10 [1984 U.S.C.C.A.N. 3492]. Thus, Congress appeared to understand, as the language of Section 924(c) suggests, that there is a distinction between carrying a gun and using a gun.

Id. at 19 n. 18 (emphasis added). Of course we owe no special deference to the views of the Solicitor General. Cf. *Crandon v. United States*, 494 U.S. 152, 177-78, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (no deference owed to Department of Justice on interpretation of criminal statutes as they are "not administered by any agency but the courts"). Where he strongly presses a narrow reading of specific language in a criminal statute, however, it is certainly some evidence that that interpretation is a reasonable one, suggesting that, in the presence of another arguably reasonable reading, we are at least confronting a statutory ambiguity that under the rule of lenity should be resolved in favor of the narrow construction. In *United States v. Ray*, 21 F.3d 1134 (D.C.Cir.1994), we relied heavily on the Solicitor General's *McLaughlin* brief, saying, in our exposition of the word "use," "It is the brandishing or displaying, in other words, that the Court [in *McLaughlin*] said heightened the danger". *Id.* at 1137. We concluded that a defendant might "use" a concealed weapon (within the meaning of § 2113(d)) when he actively exploits its existence by *threatening* people with it. *Id.* at 1140-42. I would preserve the parallel treatment between "use" in both § 924(c) and § 2113(d), and require comparable activity.[2]

Nothing in *Smith* precludes limiting "use" to active employment. Its statement that "§ 924(c)(1)'s language sweeps broadly", —— U.S. at ——, 113 S.Ct. at 2054, means only that the proscribed use of firearms is not

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[2] The majority points out that the crime at issue in *McLaughlin* and *Ray*, bank robbery involving assault or jeopardizing a person's life, inherently involves force or the threat of force, and suggests that while reading "use" narrowly to cover only open brandishing or verbal allusions made sense there, a broader reading is necessary for a furtive crime such as possession of drugs. Maj. Op. at 115 n. 1. But the point of the Solicitor General's brief in *McLaughlin* was that Congress intended a consistent (and relatively narrow) reading of the word "use" in both contexts, § 2113(d) and the relatively generic § 924(c).

limited to the obvious or typical ways in which they may assist in the commission of a crime. Rather, a gun may be "used" regardless of whether it acts as an instrument to shoot, to bludgeon, or for exchange. That is, whether a firearm is "used" does not depend on whether it is employed in the customary way or a more creative way. But it does depend on whether the gun is employed at all, and nothing the Court said expands "use" beyond active employment. The observation that a gun "at least must 'facilitat[e] or ha[ve] *the potential* of facilitating' ", *id.* at ——, 113 S.Ct. at 2059 (emphasis added), does not support an expanded definition of "use"; the Court made that point in reference to the separate "in relation to" requirement.

While the majority attempts to fine-tune the concept of facilitation (and thereby, use) through its twin guideposts of proximity and accessibility, the ultimate result is that possession amounts to "use" because possession enhances the defendant's confidence.[8] See Op. at 113, 116; *McFadden*, 13 F.3d at 466. Had Congress intended that, all it need have mentioned is possession. Cf. 18 U.S.C. § 929(a) (additional punishment for one who "uses or carries a firearm *and is in possession* of armour piercing ammunition") (emphasis added). In this regard, the majority's test is either so broad as to assure automatic affirmance of any jury conviction or, if not so broad, is unlikely to produce a clear guideline. Thus, if the new standard proves anything less than a carte blanche for conviction, it will lead to the same sort of continuous and vacillating review of jury verdicts that our past jurisprudence has yielded and that the court so rightly deplores.

* * * *

[8] Occasionally, and quite understandably, a court taking the majority's view will forget even the veneer of a requirement of more than possession in connection with the predicate crime. "[Defendant] was also convicted of two or three counts of *use or possession* of a firearm in connection with drug trafficking crimes in violation of 18 U.S.C. § 924(c)(1)." *United States v. Windom*, 19 F.3d 1190, 1192 (7th Cir.1994) (emphasis added).

Under my view of "use" there can be no serious argument that either Robinson or Bailey "used" the weapons as to which they were charged under § 924(c). But Bailey plainly transported his firearm in the trunk of his car, and the jury in his case was instructed to find whether the defendant had "used or carried" the weapon. Thus the question arises whether transportation of a firearm under these circumstances can sustain a conviction for carrying a firearm.

We have found "carry" to cover a gun carried, not on the defendant's person, but on that of a confederate and within easy reach of the defendant himself. *United States v. Joseph*, 892 F.2d 118, 126 (D.C.Cir.1989) (defendant at all times "within a few steps of, and usually no more than an arm's span from, the firearm"). We have also held that a jury could find that a defendant's control over confederates who carried weapons was enough to establish constructive possession, *United States v. Harrison*, 931 F.2d 65, 71 (D.C.Cir.1991), and thus upheld the conviction (which alternatively might have been sustained on a theory of aiding and abetting). The same understanding embraces the defendant who transports a weapon by motor vehicle *and* has as ready access to the weapon as he would if it were in his pocket. See, *e.g.*, *United States v. Cardenas*, 864 F.2d 1528, 1533 (10th Cir.1989) (the gun "was within effortless reach of his hands, more accessible than if it were in his own pocket"). Both readings are consistent with the basic concept of carrying a weapon on one's person (hand, pocket or holster), extended to catch the criminal who uses either confederates or mechanical transport (car, truck, ship or plane) to keep the firearm moving with him. In the motor vehicle case, the location of the weapon can render it as readily accessible as one held by an associate—if it is on hand for instant use, e.g., tucked under the driver's seat or resting on the dashboard or front passenger's seat.

I do not believe § 924(c) can properly be extended from these situations to that of the defendant who, like Bailey, transports the weapon in his car but is not shown to have had immediate access at any time while he was committing his drug trafficking offense. The effect would be to have § 924(c) embrace virtually every instance where a drug trafficker transports a weapon; in view of Congress's provision of a separate penalty in an adjacent section for anyone who "transports" a weapon with intent to commit a crime punishable by as much as a year's imprisonment, 18 U.S.C. § 924(b), that seems an improbable duplication. Cf. *Cardenas*, 864 F.2d at 1534-35 (rejecting equation of "carry" with "transport"). Rather, consonant with an active notion of "use", with the Senate Report's example of a weapon carried in the defendant's pocket, see *supra* at 122, and with the principle of the "constructive possession" cases that the defendant may use the gun on a moment's notice, the word "carry" must entail immediate availability. Thus, the gun locked in the trunk of Bailey's car was not accessible enough to support a conviction for carrying the gun during and in relation to his possession with intent to distribute drugs.

That is not to say that a defendant arrested with a gun in his trunk may never be convicted under § 924(c). Realistically, drug dealers often operate out of car trunks, returning from a distribution station to replenish drugs, deposit cash or retrieve a weapon. If the government presents evidence that the defendant handled the weapon by placing it in the car "during and in relation to" action taken in the commission of a predicate offense, that evidence would be sufficient to sustain a conviction. Alternatively, there may be cases where the government can prove that the defendant bought the firearm such a short time before arrest on the drug trafficking offense as to sustain an inference (beyond a reasonable doubt) that he must have been handling it simultaneously with commission of the drug offense. But as a gun can obviously

rest in a trunk for a long period, the mere fact of a gun's presence there, coupled with the defendant's use of the car for drug distribution, does not give rise to an inference of the necessary simultaneity of immediate access to the weapon (in a context of moving it about) and commission of the predicate crime. As there appears to be no evidence in the record against Bailey beyond his drug trafficking and the location of the weapon in the trunk, his conviction cannot be sustained on such a ground.

* * * *

The majority's expansive view of "use" virtually emasculates the role of the term "carry" in the statute. If "use" is understood to require real activity (such as brandishing, displaying or threatening), and "carry" to require conveying the firearm, coupled with immediate ability to put it to active use, both terms will have a meaningful yet distinct content, consistent with the language, context and legislative history of § 924(c).

* * * *

I would reverse the convictions of both Bailey and Robinson.

SILBERMAN, Circuit Judge, dissenting:

I think it most unfortunate that the majority opinion is directed, virtually entirely, at our past precedent dealing with the difficult question presented. We agreed, through the *en banc*ing of these cases, that we needed to think harder about § 924(c) to see if we could arrive at a more coherent standard firmly rooted in the statute. The standard advanced in Judge Williams' lucid opinion represents the product of that rethinking—at least on the part of the dissenters—and I would have thought that the majority might have marshaled the effort to confront fully the analysis set forth in the dissent.

SUPREME COURT OF THE UNITED STATES

No. 94-7492

CANDISHA SUMMERITA ROBINSON,
aka CANDYSHA ROBINSON,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 94-7448, *Roland J. Bailey v. United States,* and a total of one hour is allotted for oral argument.

April 17, 1995